

**The
Objectives of
Canadian Competition
Policy
1888-1983**

Paul K. Gorecki
and W.T. Stanbury





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Foreword

All Western industrialized nations have enacted legislation against restraints of trade. Canada's first such legislation was enacted almost a century ago in 1889, one year before the famous *Sherman Act* in the United States. The present *Combines Investigation Act* was originally enacted in 1910, although it has been amended several times since then. In the Speech from the Throne on 7 December 1983, the government announced that the Act is to be amended to "modernize [the] conspiracy, monopoly and merger provisions, and promote the interests of consumers and small business through a freer market place."

Despite the longevity and importance of competition policy, there has been no comprehensive study of its objectives. Hence this work by Gorecki and Stanbury fills a gap in our understanding of how the objectives of a public policy are adapted to changes in the economy, shifts in political priorities, new developments in theory, and refinements in judicial decision making.

Indeed, one of the most striking findings of this study, in the words of the authors, is that:

... competition policy in Canada is like a great tree that adapts to the political seasons. It creates new branches as well as dropping some old ones. But it holds steadfast to those objectives that are fundamental to its existence.

This has occurred despite the fact that the number of objectives which the policy is supposed to achieve has increased over time. Different objectives have come to the fore at different times. Not

surprisingly, there has been conflict over the purposes that competition policy should serve.

This volume is the fourth published by the Institute on competition policy and corporate concentration. The previous ones were *Competition Policy in Canada: Stage II, Bill C-13* (J.W. Rowley and W.T. Stanbury, eds., 1973); *Canada's Competition Policy Revisited: Some New Thoughts on an Old Story* (I. Brecher, 1982); and *Perspectives on the Royal Commission on Corporate Concentration* (P.K. Gorecki and W.T. Stanbury, eds., 1979).

I hope that this volume will help to stimulate informed public debate on Canada's competition policy.

Gordon Robertson
Past President and Fellow-in-Residence

July 1984

Avant-propos

Tous les pays industriels occidentaux ont adopté des lois visant à empêcher les restrictions commerciales. La première loi canadienne du genre fut adoptée il y a près d'un siècle, plus précisément en 1889, soit un an avant que le célèbre *Sherman Act* n'entre en vigueur aux États-Unis. Bien qu'elle ait subi plusieurs modifications depuis, la présente *Loi relative aux enquêtes sur les coalitions* a d'abord été adoptée en 1910. Dans le discours du Trône du 7 décembre 1983, le gouvernement annonçait qu'il allait l'amender de nouveau afin de « rajeunir les dispositions relatives à la conspiration, au monopole et à la fusion, et promouvoir les intérêts des consommateurs de la petite entreprise en libéralisant davantage le marché. »

En dépit de son âge et de son importance, les objectifs de la politique en matière de concurrence n'ont jamais été étudiés en profondeur. La présente étude de MM. Gorecki et Stanbury vient donc combler une lacune car les auteurs y analysent la manière dont les objectifs d'une politique publique s'adapte aux changements économiques, aux modifications des priorités politiques, aux nouveaux développements théoriques et aux jugements plus définitifs des tribunaux.

Selon les dires mêmes des auteurs, l'une des conclusions les plus frappantes de cette étude c'est effectivement que :

... tel un grand arbre, la politique canadienne en matière de concurrence s'adapte aux saisons politiques. Des branches nouvelles poussent, d'autres tombent, mais l'arbre demeure bien enraciné dans ces objectifs qui lui donnent vie.

Cela s'est produit même si le nombre d'objectifs visés par cette politique a augmenté avec le temps. L'importance relative de chacun des objectifs a fluctué selon les époques et, comme on pouvait s'y attendre, on ne s'est pas toujours entendu sur les buts que la politique en matière de concurrence devait privilégier.

Ce volume est le quatrième volume que publie l'Institut sur la politique en matière de concurrence et la concentration des entreprises. Les autres titres sont *Competition Policy in Canada: Stage II, Bill C-13* (J.W. Rowley et W.T. Stanbury, éd., 1978); *Canada's Competition Policy Revisited: Some New Thoughts on an Old Story* (I. Brecher, 1982); et *Perspectives on the Royal Commission on Corporate Concentration* (P.K. Gorecki et W.T. Stanbury, éd., 1979).

J'espère que ce volume aidera à alimenter un débat public éclairé sur la politique canadienne en matière de concurrence.

Ancien président
Gordon Robertson

Juillet 1984

The Authors

Paul K. Gorecki has worked, for the past six years, on the staff of the Economic Council of Canada, where he has helped prepare two Council consensus reports on government regulation, as well as one on technology, trade and income growth. He was educated at the University of London and Queen's University, Kingston, Ontario. His previous employment included several years with the Bureau of Competition Policy, Department of Consumer and Corporate Affairs, and a visiting appointment at Simon Fraser University. Industrial organization, regulation and competition policy are Gorecki's main areas of research.

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Preface

This study is a part of our work, which has been in progress for a number of years, on the administration and enforcement of the *Combines Investigation Act*. See Gorecki (1981a); Gorecki and Stanbury (1979a, 1981a); and Stanbury (1976, 1981a, 1984). The study was interrupted by a number of other projects, notably our work on the Regulation Reference at the Economic Council of Canada between mid-1978 and early 1981: see Economic Council (1979, 1981).

We are indebted to Judy Bradley and Melanie Dobbin for word-processing services under difficult conditions. The comments and corrections of T.D. MacDonald and Roy Davidson were most useful. We are grateful to them for their efforts. We are also indebted to the federal Department of Consumer and Corporate Affairs (Bureau of Competition Policy) and to The Institute for Research on Public Policy for their support of this study.

Paul K. Gorecki
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July 1984



Summary

In this study we provide a detailed review and analysis of the objectives of Canadian competition policy since its inception almost a century ago. We do so in the hope that businessmen and others who read this volume will better understand the objectives and perhaps acquire a greater sympathy for them.

The Major Objectives

While a fairly large number of objectives have been ascribed to Canadian competition-policy legislation over the past ninety years or so, three main themes stand out. These are:

- Preventing abuses of economic power and thereby protecting the interests both of consumers and of those businessmen who wish to be free to act in a competitive fashion. This view has been articulated by Parliamentarians, particularly in 1889 and 1910, when new legislation was enacted, and by the judiciary, particularly in cases up to World War I, but occasionally thereafter, as well.
- 'Maintaining free competition', a judicial concept, although ill-defined, which seeks to ensure that unreasonable or undue restraints on competition are struck down. This view can be found in the earliest judgments and in most judgments up to the 1970s, but it has since been largely ignored, rather than rejected, by the courts.
- Achieving economic efficiency, broadly defined to include the encouragement of the lowest cost of production and distribution, the least restriction on output, and the facilitation of technological

and organizational change in a dynamic economy. This view has been advanced largely by economists, most strongly since the late 1960s, and by the 1970s it formed the most important analytical basis for reforming Canadian competition-policy legislation.

The framers and supporters of the first competition legislation in 1889 had a clear idea of what they expected the law to accomplish. It was to prevent agreements or other arrangements among competitors that raised prices (or debased the quality of products) and 'rooked' the consumer or the farmer. It was also to ensure that those businessmen who sought to restrain trade were not able to coerce their competitors who wished to remain free of agreements to curb competition, by such means as predatory pricing, refusal to deal or similar 'disciplinary' practices.

The proponents of the law of 1889 genuinely believed that 'competition is the life of trade', even though it makes life challenging, or even rather difficult, for businessmen. They believed that prices, particularly of the 'necessaries of life', should be set by the forces of competition. Free and open competition would protect the interests of consumers and the interests of businessmen who wanted to prosper by offering to the public lower prices, higher quality, or new types of goods and services.

The framers of Canada's early legislation were *not* hostile to big business in general. Indeed, they believed that the nation as a whole stood to benefit from 'large aggregations of capital'.

Mackenzie King, then the Minister of Labour, and other legislators held the view that with the power that accompanies large size went responsibility, particularly when large firms also accounted for a considerable share of their markets. Such power, the legislators said, must not be abused. Consumers, workers and competitors must not be exploited, although it was recognized that fair competition could be tough, and weak competitors would be weeded out. Such a system of free enterprise and free competition was believed to deliver the highest standard of living for the nation.

King would probably have little dispute with policy makers' frustrated efforts to reform the legislation since 1971, when Bill C-256 was introduced. While the central objective of that bill, of the ill-fated Bills C-42 and C-13, in 1977, and of the Minister's proposals in 1981 was to ensure that resources are allocated efficiently, the details of the proposed legislation would have been consistent with King's views. For example, monopoly as such was not condemned. Rather, the abuse of monopoly power (dominant position) expressed in terms of 'bad behaviour' (predatory or exclusionary conduct) was to be proscribed. A monopoly position obtained by fair

means such as greater efficiency or innovation was not to be attacked. Moreover, mergers, even if they lessened competition 'substantially', could be permitted if they were likely to result in real gains in efficiency.

In general terms, the concentration of economic power would not be constrained by competition-policy legislation, except where it resulted in certain types of restraint of trade as defined in the Act.

As we describe in detail in Chapter 3, from the earliest cases, the Canadian courts have consistently held that the public is entitled to the right of 'free competition', a term of ancient lineage even before the twentieth century. Oppressive and unreasonable restrictions on competition, the courts said, have been prohibited by Parliament. In the first price-fixing case to reach the Supreme Court of Canada, Chief Justice Sir Charles Fitzpatrick stated that the legislation was aimed at "the undue and abusive lessening of competition which operated to the oppression of individuals or is injurious to the public generally."

The courts have made it abundantly clear that although agreements to fix prices or allocate markets may be "advantageous or even necessary for the protection of the business interests of the parties", they are condemned by the legislation. The public's right to free competition must predominate if the agreement is held to lessen competition "improperly, inordinately, excessively or oppressively", to use the words of the trial judge in the first combines conviction in 1903.

It should also be emphasized that while the courts embraced what has been called 'the doctrine of free competition', their approach to price-fixing and market-sharing agreements was different than was that of their counterparts in the United States. This difference, in turn, reflected important differences in the legislation itself.

In practice, at least as far as the decided cases were concerned, the differences between the Canadian and American policies were smaller than the language of the statutes would indicate. The Canadian courts convicted in virtually every case where the accused accounted for 50 per cent or more of the market and had sought to fix prices or allocate markets. The reach of the *per se* rule in the United States was widened over time by the courts while the Canadian cases prosecuted in Canada, until recently, were largely 'garden variety' horizontal agreements to fix prices or carve up markets. Between 1924 and 1975, the Crown won 90 per cent of such cases. Between 1975/76 and 1979/80, however, it won only 58 per cent of conspiracy cases. In the last three years, it won only 42 per cent. (See Table 5-B in Appendix B.) In the most recent conspiracy cases to

reach the Supreme Court of Canada, *Aetna Insurance* in April 1977 and *Atlantic Sugar* in July 1980, a majority of the Court has retreated from its earlier rulings. In fact, it has severely weakened the law.

The idea that economic efficiency should be the principal objective of competition policy is of fairly recent origin, as noted in Chapter 4. While it was given some weight in the 1950s, perhaps the strongest endorsement was given by the Economic Council of Canada in 1969. The Council said, "the main objective of competition policy should be that of obtaining the most efficient possible performance from the economy... in dynamic as well as static terms... and the avoidance of economic waste...". Efficiency, of course, is not an end in itself. Rather it is the means by which the material well-being of all Canadians may be increased. The Council argued that competition is desired because it is the most important means to achieve economic efficiency.

In the preamble of Bill C-256, introduced in 1971, it was argued that not only is competition the best means of achieving efficiency, but that it is also the best method to transmit the benefits of efficiency to the public and an effective way to decentralize economic power. Both the Skeoch-McDonald report in 1976 and the proposed Stage II amendments in 1977 (Bills C-42 and C-13) gave more weight to "the dynamic forces that have been responsible for the prodigious economic growth" that the market system has achieved. Dynamic efficiency is concerned with innovation in technology and organization that produces new products and services and that results in ways to produce existing outputs at lower cost or to improve their quality. The essence of dynamic efficiency is flexibility and adaptability to changing economic and social conditions. In such an environment, entrepreneurial skills are stimulated and rewarded. In an economy of opportunity and of choice, the role of competition policy is to strike only at those activities that would give competitors an advantage not attributable to superior economic performance.

The Lesser Objectives

In addition to the major objectives, we identify a number of lesser ones. The original legislation of 1889 was widely believed to be declaratory of the common law, although, in fact, it was not. This mistake, however, did not perceptibly influence the subsequent development of the jurisprudence.

Governments, in periods of high inflation, have regularly stated that competition policy is useful in curbing rising prices. The first

Combines Investigation Act, enacted in 1910, stemmed in part, at least, from the political pressures attributable to the bout of inflation occurring at that time. The same forces resulted in the *Board of Commerce Act* and the *Combines and Fair Prices Act* passed in 1919. The latter provided for the direct control of prices. In 1951, when resale price maintenance was prohibited, one of the arguments given to support the move was that the practice was inflationary. When Bill C-256 was introduced in 1971, the Minister responsible argued that a tougher competition policy could "help to moderate inflation".

On a number of occasions, changes in the legislation have been advanced as being of particular benefit to small business. In 1935, in the midst of the Great Depression, the federal government introduced legislation to prevent price discrimination and predatory pricing, thus protecting small business from 'unfair' and 'ruinous' competition. It has been argued recently — incorrectly, in our view — that resale price maintenance was made illegal in 1951 to protect small business. Canada has never gone as far as the United States in protecting small firms, even at the expense of the competitive process itself. The latter has been most noticeable in the language and enforcement of the *Robinson-Patman Act* of 1936.

Primarily during the 1950s, competition policy was seen by the Ministers responsible for its enforcement as being of service in "maintaining the free enterprise system". If private restraints were not limited by anti-combines legislation, it was argued, popular political pressure would result in greater government intervention in the form of direct regulation, or public ownership. Alternatively, a form of corporatism would emerge. The former theme appeared again in 1981, when the Minister of Consumer and Corporate Affairs argued that businessmen should not oppose reforms to competition legislation.

In the 1960s and 1970s, one of the lesser objectives of competition policy was to maintain fairness and honesty in the market-place. The implementation of this objective saw the introduction in the Act of offences related to misleading price advertising, misleading and deceptive statements of fact, and misleading statements and guarantees of performance not based upon a proper test. Beginning in the 1970s, a large number of charges have been brought under these sections of the Act.

Finally, the objectives of Canadian competition policy can be thought of as a political compromise between the conflicting interests of consumers and producers (that is, business). The policy in practice is perceived by some political scientists, sociologists and economists as paying lip-service to the objectives of 'efficiency',

'competition', and the 'prevention of monopolistic exploitation' while, at the same time, not seriously inconveniencing the business community's freedom of action and instincts to impose a wide variety of restraints of trade.

Abrégé

Cette étude présente une analyse et un examen détaillés des objectifs de la politique canadienne en matière de concurrence depuis son élaboration, il y a de cela près d'un siècle. Nous espérons que les gens d'affaires et tous ceux qui liront ce volume apprendront à mieux connaître ces objectifs et peut-être à mieux les apprécier.

Les principaux objectifs

Même si au cours des quatre-vingt-dix dernières années on a attribué un grand nombre d'objectifs à la législation canadienne en matière de concurrence, on peut quand même y distinguer trois grands thèmes :

- Prévenir les abus du pouvoir économique et, par conséquent, protéger les intérêts tant des consommateurs que des gens d'affaires qui veulent être libres d'agir de façon concurrentielle. Ce point de vue a été celui des parlementaires, particulièrement en 1889 et en 1910, alors que de nouvelles lois furent adoptées. Ce fut également celui de l'appareil judiciaire, avant la Première Guerre mondiale surtout, mais quelquefois également par la suite.
- « Préserver la libre concurrence » est un concept juridique qui, bien que mal défini, cherche à abolir les restrictions déraisonnables ou abusives imposées à la concurrence. On retrouve ce point de vue dans les tout premiers jugements et dans la plupart de ceux qui furent prononcés avant les années 1970; mais depuis lors, les tribunaux l'ont plutôt ignoré que rejeté.

- Atteindre l'efficacité économique, entendue au sens large, de manière à inclure la recherche du moindre coût de production et de distribution, de la moindre restriction à la production et de l'encouragement au changement technologique et organisationnel dans une économie dynamique. Cette opinion qui fut surtout émise par des économistes, et ce plus particulièrement depuis la fin des années 1960, constitue, depuis les années 1970, le fondement analytique le plus important de la réforme de la législation canadienne relative à la politique en matière de concurrence.

Ceux qui ont élaboré et appuyé la première loi relative à la concurrence, en 1889, avaient une idée claire de ce qu'ils attendaient de cette législation. Il s'agissait d'empêcher que des concurrents ne se mettent d'accord pour augmenter les prix, réduire la qualité de leurs produits ou « rouler » le consommateur ou le cultivateur.

La loi voulait aussi assurer que les hommes d'affaires qui cherchaient à restreindre le commerce ne puissent forcer la main de ceux de leurs concurrents qui ne souhaitaient pas conclure d'ententes pour écraser la concurrence par des pratiques telles que la baisse autoritaire des prix, le refus de négocier ou d'autres pratiques « disciplinaires » semblables.

Les proposeurs de la loi de 1889 croyaient sincèrement que « la concurrence est l'âme du commerce » — même si elle pose des défis et même crée des problèmes pour les gens d'affaires. Il croyaient que les prix, et particulièrement ceux des « biens essentiels » devaient être fixés par les forces de la concurrence. Libre et ouverte, cette concurrence devait protéger les intérêts des consommateurs et ceux des gens d'affaires qui cherchaient à prospérer en offrant au public des prix plus bas, une qualité meilleure ou des biens et services nouveaux.

Les penseurs des premières lois canadiennes n'étaient pas hostiles à la grande entreprise en général. À vrai dire, ils croyaient que le pays tout entier pourrait tirer profit des « grandes concentrations de capital ». Mackenzie King, alors ministre du Travail et d'autres législateurs étaient d'avis que le pouvoir conféré par la grande taille allait de pair avec la responsabilité, surtout lorsque les grandes entreprises rendent également compte d'une partie importante de leurs marchés. Les législateurs affirmaient qu'il ne fallait pas abuser d'un tel pouvoir, qu'il ne fallait pas exploiter les consommateurs, les travailleurs et les concurrents. Ils admettaient toutefois que même loyale, la concurrence pouvait être rude et que les concurrents les plus faibles seraient éliminés. On croyait qu'un tel système de libre entreprise et de libre concurrence procurerait au pays de plus haut niveau possible de vie.

Monsieur King aurait probablement applaudi les efforts frustrés des penseurs qui ont essayé de modifier la loi depuis 1971, alors qu'on déposait le Bill C-256. Même si ce bill, comme les malheureux Bills C-42 et C-13, soumis en 1977, et les propositions ministérielles de 1981 visaient avant tout à l'affectation efficiente des ressources, les détails de ces projets de loi étaient conformes aux vues de M. King. Ainsi, les monopoles n'y étaient pas condamnés comme tels, on y proscrivait plutôt l'abus du pouvoir de monopole (situation dominante) exprimé en termes de comportement répréhensible (conduite abusive ou exclusivisme). On ne devait pas s'attaquer au monopole obtenu par des moyens justes tels une plus grande efficacité ou un esprit plus novateur. On pouvait en outre tolérer certaines fusions, même si elles diminuaient « substantiellement » la concurrence, dans la mesure où elles pouvaient conduire à une efficacité réellement accrue. En somme, la loi sur la concurrence ne visait pas à restreindre la concentration du pouvoir économique, sauf lorsque cette concentration entraînait certaines restrictions commerciales définies dans la loi.

Comme nous le décrivons en détail au Chapitre 3, depuis les toutes premières causes, dont ils aient été saisis, les tribunaux canadiens ont toujours soutenu que le public a droit à la « libre concurrence » — expression qui a vu le jour avant même le XX^e siècle. Les tribunaux ont jugé que le Parlement avait interdit de restreindre la concurrence de manière oppressive et déraisonnable. Lorsque la Cour suprême du Canada fut saisie pour la première fois d'une cause relative à la fixation des prix, le juge en chef Sir Charles Fitzpatrick déclara que la loi s'attaquait à la « restriction induue et abusive de la concurrence qui opprime les particuliers ou porte atteinte au public en général ».

Les tribunaux ont clairement démontré que la loi interdit toute entente visant à fixer les prix ou à s'accaparer les marchés, même si ces accords sont « avantageux sinon essentiels pour la sauvegarde des intérêts commerciaux des parties ». Si l'on juge que l'accord restreint la concurrence « de manière malhonnête, excessive, démesurée ou oppressive » pour employer les mots du juge qui a prononcé la première condamnation relative aux coalitions, en 1903, c'est le droit du public à la libre concurrence qui doit prédominer.

Il importe aussi de remarquer que, bien que les tribunaux aient embrassé ce qu'on a baptisé « la doctrine de la libre concurrence », leur approche des accords de fixation des prix et de partage des marchés s'est distinguée de celle des tribunaux américains; ces dissimilitudes ne faisaient que refléter les différences importantes qui existent entre les lois elles-mêmes.

En pratique, toutefois, du moins en ce qui a trait aux jugements rendus, les différences entre les politiques canadienne et américaine étaient moins grandes que les textes de loi n'auraient pu le laisser croire. Les tribunaux canadiens ont prononcé une condamnation dans pratiquement toutes les causes où l'accusé s'était accaparé de 50 % ou plus du marché et avait cherché à fixer les prix ou partager les marchés. Avec le temps, les tribunaux américains ont élargi la portée de la règle *per se*, alors que jusqu'à tout récemment les causes canadiennes entendues au Canada portaient sur des accords horizontaux en vue de fixer les prix ou s'accaparer les marchés. De 1924 à 1975, la Couronne a remporté 90 % de ces causes. De 1975/76 à 1979/80, cependant, elle n'a eu gain de cause que dans 58 % des cas de conspiration et, au cours des trois dernières années, la Couronne n'a eu raison que dans 42 % des causes. (Voir le Tableau 5-B à l'Annexe B.) Dans le cas des causes les plus récentes de conspiration à être entendues par la Cour suprême, soit *Aetna Insurance* en avril 1977 et *Atlantic Sugar* en juillet 1980, la majorité des juges a rompu avec les jugements antérieurs. En fait, la portée de la loi a été gravement affaiblie.

Comme nous l'indiquons au Chapitre 4, l'idée voulant que l'efficacité économique soit le principal objectif d'une politique en matière de concurrence est assez récente. Même si cette idée avait acquis un certain poids au cours des années 1950, c'est probablement le Conseil économique du Canada qui lui a accordé l'appui le plus fort lorsqu'il affirmait, en 1969, que « la politique en matière de concurrence devrait viser avant tout à obtenir de l'économie le rendement le plus efficace possible, . . . tant en termes dynamiques que statiques . . . et à éviter le gaspillage économique . . . ». L'efficacité n'est évidemment pas une fin en soi. C'est plutôt le moyen par lequel on peut augmenter le bien-être matériel de l'ensemble des Canadiens. Le Conseil soutenait que la concurrence est souhaitable parce qu'elle constitue le moyen le plus important pour atteindre l'efficacité économique.

Dans le préambule du Bill C-256, déposé en 1971, on soutenait que la concurrence est non seulement le meilleur moyen d'atteindre l'efficacité mais qu'elle est aussi la méthode la plus adéquate pour faire partager les avantages de l'efficacité au public. On ajoutait aussi que c'est un moyen efficace pour décentraliser le pouvoir économique. Le rapport Skeoch-McDonald en 1976 et les Projets d'amendements de la deuxième étape en 1977 (Bills C-42 et C-13) accordaient plus de place aux « forces dynamiques responsables de la prodigieuse croissance économique » affichée par le régime de marché. L'efficacité dynamique est liée à l'innovation technologique et organisationnelle qui suscite la création de nouveaux

produits et services, puis entraîne la mise au point de procédés de fabrication permettant de réduire les coûts ou d'améliorer la qualité de ces produits. La flexibilité et la capacité d'adaptation à des conditions économiques et sociales mouvantes sont les deux caractéristiques essentielles de l'efficience dynamique. Dans un contexte de ce genre, les qualités « d'entrepreneur » sont stimulées et récompensées. Dans une économie de possibilités et de choix, le rôle de la politique en matière de concurrence est de ne frapper que les activités qui accorderaient aux concurrents un avantage non justifié par la supériorité de leur rendement économique.

Les objectifs secondaires

Nous avons identifié un certain nombre d'objectifs secondaires qui se greffent à ces objectifs principaux. On avait cru que la Loi originale de 1889 était déclaratoire du droit coutumier alors qu'elle ne l'était pas. Cette erreur n'a cependant pas influencé de façon sensible l'évolution subséquente de la jurisprudence.

En période de forte inflation, les gouvernements ont régulièrement déclaré que la politique en matière de concurrence est utile pour freiner la hausse des prix. Ce sont en partie les pressions politiques attribuables à la lutte contre l'inflation que l'on menait à l'époque qui ont amené l'adoption de la première Loi relative aux enquêtes sur les coalitions, adoptée en 1910. Ce sont ces mêmes forces qui nous ont valu, en 1919, la Loi de la Commission de commerce et la Loi des coalitions et des prix raisonnables. Les provisions de cette dernière loi permettaient un contrôle direct des prix. En 1951, lorsqu'on interdit la fixation du prix de revente, on alléguait, entre autres, que cette pratique était inflationniste. Lorsque le Bill C-256 fut déposé en 1971, le ministre responsable soutint qu'une politique plus rigoureuse en matière de concurrence pourrait « aider à modérer l'inflation ».

On a souvent proposé des amendements à la loi en alléguant qu'ils seraient particulièrement profitables pour la petite entreprise. En 1935, en pleine crise économique, le gouvernement fédéral déposait une loi pour empêcher la discrimination des prix et la baisse autoritaire des prix, protégeant ainsi la petite entreprise contre une concurrence « injuste » et « ruineuse ». On a récemment soutenu, à tort selon nous, que c'est afin de protéger la petite entreprise que l'on a rendu illégale la fixation du prix de revente, en 1951. Le Canada n'est jamais allé aussi loin que les États-Unis dans le sens de la protection des petites entreprises aux dépens du processus de

concurrence, phénomène particulièrement manifeste dans le texte et l'application de la *Robinson-Patman Act* de 1936.

C'est surtout au cours des années 1950 que les ministres responsables de la mise en oeuvre de la politique en matière de concurrence ont jugé qu'elle contribuait à « sauvegarder le régime de libre entreprise ». On soutenait que si des lois relatives aux coalitions ne limitaient pas les restrictions privées, les pressions politiques populaires occasionneraient une plus grande intervention de l'État sous la forme de réglementation directe ou d'entreprise d'État et que cela provoquerait l'émergence d'une certaine forme de corporatisme. Ce thème a ressurgi en 1981, lorsque le ministre de la Consommation et des Corporations a soutenu que les gens d'affaires ne devraient pas s'opposer aux réformes de la loi sur la concurrence.

Au cours des années 1960 et 1970, l'un des objectifs secondaires de la politique en matière de concurrence était de maintenir l'équité et l'honnêteté dans le monde des affaires. L'adoption de cet objectif a occasionné l'introduction dans la Loi de certaines infractions relatives à la publicité trompeuse en matière de prix, à des déclarations de fait fallacieuses et mensongères ainsi qu'à des déclarations trompeuses et à des garanties de rendement ne s'appuyant pas sur des essais appropriés. Depuis les années 1970, on a porté un grand nombre d'accusations en vertu de ces articles de la Loi.

On peut enfin considérer les objectifs de la politique canadienne en matière de concurrence comme un compromis politique entre les intérêts contradictoires des consommateurs et des producteurs, c'est-à-dire le monde des affaires. Certains politicologues, sociologues et économistes croient qu'en pratique, même si la politique semble viser des objectifs « d'efficacité, de concurrence et de prévention d'exploitation par des monopoles », elle ne porte pas sérieusement atteinte à la liberté d'action du monde des affaires et à sa volonté d'imposer toute une gamme de restrictions commerciales.

1: Introduction

Rationale

A useful analysis and evaluation of any public policy must try to come to grips with the objectives of that policy,¹ since these may strongly influence its implementation. The purpose of this study is to describe and to analyse the objectives of Canada's competition policy² as seen by a wide variety of commentators in the nine decades in which there has been federal legislation on the subject. We have used the word 'objectives' in the plural, implying that any broadly based policy such as competition policy seeks to achieve not a single objective, but rather a number of possibly conflicting ones. As Herbert Simon (1964) has pointed out, an organization's actions must satisfy a whole set of requirements or constraints, and it is simply a convention to single one out and refer to it as 'the goal' of an action. Formally, objectives and constraints are interchangeable so that goals or objectives can be thought of as those constraints which motivate the policy/decision maker and guide his search for a policy action that will satisfy the set of constraints. In general, the problem is compounded as the passage of time brings to the fore new policy actors, different values, and different economic and social conditions. It is hardly surprising, therefore, that at different times, essentially the same legislation can be reinterpreted and said to be aimed at the achievement of apparently different goals.

We found that the publicly stated objectives of competition policy did change over time. In particular, the official rhetoric used to justify the policy and to support changes in it was a reflection of its times. We found that the three major objectives — preventing abuses of economic power; maintaining free competition; and

achieving economic efficiency — are unlikely to be in conflict with one another. Hence, the core of competition policy, in operational terms, has been remarkably consistent over ninety years.

Any analysis of the goals of a piece of legislation (and the policy of which it is a part) must demonstrate awareness of the possible differences between *stated* objectives and 'true' objectives. For the most part, we had to work with the public statements of politicians, judges, public servants and academics. To only a limited extent can we verify such statements with reference to observed behaviour. (See, for example, Gorecki and Stanbury, 1979a, and Gorecki, 1981a.) But statements about legislative objectives may not closely coincide either with the administrative behaviour of the agencies that implement the legislation or with the actual effect(s) of the legislation in practice. There is much truth to the adage that "There is many a slip between cup and lip." But it is also true that there are too many actors and too many intervening variables simply to apply the observation, "Watch what I do, not necessarily what I say."

What is the point of inquiring into the objectives of a particular public policy? First, a clear specification of objectives of a policy provides the initial criteria by which that policy can be evaluated. In the first instance, a policy should be evaluated in its own terms, that is, in terms of the objectives it was said to be designed to achieve. The specification of the objectives should be separated from any debate about the desirability of the objectives themselves. Thomas E. Kauper (1980, p. 408), a former Assistant Attorney General in charge of the Antitrust Division of the U.S. Department of Justice, points out: "antitrust cannot be evaluated in the abstract, since evaluation requires a clear understanding of goals. Disagreement over the effectiveness of antitrust is commonly a disagreement over its goals." Secondly, a knowledge of the objectives can be used as a device to organize and to understand a variety of phenomena associated with a particular policy. At the very least, such phenomena can be classified as consistent or inconsistent with the achievement of the stated objectives.

Thirdly, if we assume that most human behaviour is purposive (rather than stochastic), then accurate knowledge of an individual's or an organization's purposes is useful in predicting behaviour. Any analysis of the goals of a policy must be sensitive to the concept of a means-ends chain. (See Braybrooke and Lindblom, 1970.) It is virtually impossible to speak of 'ultimate' goals. Most stated goals are intermediate targets, the achievement of which provides the means to achieve a less immediate end.³ If we say that the objective of competition legislation is to prevent undesirable restraints of trade,

and hence to facilitate effective competition, are we saying that the effective competition is the 'real' objective of such legislation? Or is competition a means to an end such as efficiency in the allocation of goods and services? Is efficiency the real objective, or do we want it only because it is the means to increase the economic welfare of the population as a whole? Obviously, the argument can be extended.

If multiple goals are inherent in a broadly based policy such as competition policy, which goals are more important than others? Any analysis of legislative objectives should try to determine the hierarchy of goals.⁴ Since statements about goals are often aimed at legitimizing certain forms of behaviour, the observed conflict of objectives may be more apparent than real if some of the stated objectives are really 'window dressing'. Real priorities are those for which an individual or an organization is willing to sacrifice other objectives, and for the achievement of which one is willing to make a significant commitment of resources. Therefore it is important to go beyond stated objectives and to examine the behaviour of the government, from which one might infer its real objectives. Speeches in Parliament against the evils of combines or even the introduction of new legislation may be less indicative of a government's intentions than the authorization of prosecutions that would curtail combines' abuses.⁵ Analysts must be alert to the presence of rhetoric that is used as a substitute for administrative action. Symbolic gestures designed to reassure the less well informed while not hurting the 'powers that be' have been important in the field of competition policy.⁶

Methodology

Where do we find evidence as to the objectives of Canadian competition policy? Surprisingly, no thorough analysis has been done to date, although the issue has been the subject of considerable comment in the United States.⁷ Robert Bertrand (1978, p. 20), Director of Investigation and Research under the *Combines Investigation Act* between 1976 and 1981, has stated: "The purposes of Canadian competition policy are not stated in the Act, but can be inferred from such evidence as the Act itself as amended from time to time, from ministerial statements, and from official studies." Professor L.A. Skeoch (1956, p. 20) offered an extension of this approach:

There are a number of sources from which information can be drawn both as to the general intent of the combines legislation

and as to the more specific aspects of that intent. The sources that are available to the public are: the legislation itself; statements made in Parliament by the responsible minister at times when the legislation was under review; statements made by bodies appointed by the Government to review the legislation and its administration; reports issued by the Combines Branch, both those that allege that public detriment has occurred and those that find to the contrary; and, finally, court decisions dealing with cases brought under the combines legislation.

Writing a decade and a half later, Milton Moore (1970, p. 105) emphasized that it is the effects of the legislation that are of "primary importance", but "the degree to which the presumed intent of the law has been realized is also of interest." Moore (*ibid.*) warns us that "the intent of the statute is by no means easy to discern", and that the different sources of evidence of intent are "not likely to yield a unique interpretation." He suggested six different sources of intent, which are similar to those of Skeoch:

- The plain meaning of the statute, which is not "free of all ambiguity and of qualitative elements."
- Debates in Parliament, an "obvious primary source", but the source of conflicting statements and "ministerial statements . . . notorious for their ambivalence."
- Judicial interpretation. "The use of this source implicitly assumes that Parliament accepts the courts' interpretation as its . . . intent"
- Reports of the Director of Investigation and Research, "a secondary source"
- Cases taken to the courts. "A complementary source is . . . those [cases] which are not taken, and . . . [those] not appealed to the Supreme Court."
- The effects of the statute. We should determine the effects of the legislation "and reason back to intent" (Moore, 1970, pp. 105-6.)

The approach followed in this study is somewhat like that advocated by Skeoch and Moore, but it is more comprehensive. In preparing this study, we began by identifying the important sources of statements on the objectives of Canadian competition policy. We grouped these into seven categories.

(i) Statements by the Ministers responsible to Parliament for the administration and enforcement of the legislation. The relevant Ministers were as follows:

- Minister of Labour, 1910 – 1945⁸
- Minister of Justice, 1945 – 1965
- President of the Privy Council, Jan. 1 – Sept. 30, 1966
- Registrar General of Canada, Oct. 1, 1966 – Dec. 20, 1967
- Minister of Consumer and Corporate Affairs, Dec. 21, 1967 to date.

These statements may be found in two major sources. The first is the parliamentary debates during the period when the major legislative change in the statute (or attempts to change the statute) took place. Secondly, they may be found in speeches the Minister made concerning competition policy. These speeches are currently filed in the historical section of the library of the Department of Consumer and Corporate Affairs. They are available, however, only for the period from 1949 to the present. For the period prior to 1949, the Minister's statements in Parliament can be supplemented by reference to published articles. This is easiest for W.L. Mackenzie King, who sponsored the important *Combines Investigation Acts* of 1910, 1923 and 1937. See King (1911, 1912).

(ii) Reports of committees, commissions, advisory boards set up by the government or by Parliament to study, examine and report to the government of the day on competition policy (or related subjects). There are seven major reports in this category, submitted by various agencies: the Select Committee to Investigate and Report upon Alleged Combines in Manufactures, Trade and Insurance in Canada (Canada, 1888); the Royal Commission on Price Spreads (Canada, 1935); *Canada and International Cartels* (Canada, 1945a); the MacQuarrie Committee (Canada, 1952); Economic Council of Canada (1969); the Skeorch-McDonald report (1976);⁹ and the Report of the Royal Commission on Corporate Concentration (Canada, 1978).

(iii) Statements by the agency or individual public servant charged with administering and enforcing Canada's competition policy. The titles of the (federal) administrators were as follows:

- Board of Commerce, 1919 – 1923
- Registrar, 1923 – 1935
- Dominion Trade and Industry Commission, 1935 – 1937

- Commissioner, 1937 – 1952
- Director of Investigation and Research, 1952 to date.

Between 1889 and 1910, the legislation was designed to be enforced by the provincial attorneys-general. From 1910 to 1919, under the first *Combines Investigation Act*, six citizens could apply to a judge to establish an *ad hoc* three-person Board of Investigation to prepare a report on the alleged combine. Prosecutions under the *Criminal Code* (s. 520, later s. 498) remained with the provincial attorneys-general. Gradually, however, in the 1920s and 1930s, the provincial attorneys-general requested that the federal government undertake the prosecutions as many cases involved more than one province. By World War II, both investigation (that is, by the commissioner) and prosecution (that is, by the federal attorney-general) were conducted by federal, not provincial, authorities.

Statements by the administrators can be found principally in two places: their annual reports and speeches. Annual reports are available for the fiscal year 1922/23 onwards,¹⁰ while speeches are on record for F.A. McGregor (Registrar, 1925–1935 and Commissioner, 1937–1949), T.D. MacDonald (Commissioner and later Director, 1950–1960), D.H.W. Henry (Director, 1960–1973), R.J. Bertrand (1974–1981), and L.A.W. Hunter (1981 to date). These two sources can be supplemented by the publications of the aforementioned officials, of which Mr. Henry's are the most numerous. (See Gorecki *et al.*, 1979.)

(iv) Statements by those who interpret the legislation, that is, the judiciary. Between 1889 and 1982/83, some 246 *combines* cases were completed. (See Table 2-B in Appendix B.) This number excludes more than 1500 cases relating to misleading advertising and deceptive practices that occurred between 1960 and 1982/83. (See Table 3-B in Appendix B.) In a fair proportion of the combines cases, judges have commented on the intent of the legislation. We note, however, that in the 1970s and 1980s, judges have discussed the legislation's objectives less frequently. Concerning the use of the judicial interpretation, Moore (1970, pp. 105–6) has remarked:

The use of this source implicitly assumes that Parliament accepts the courts' interpretation as its present intent, despite possible apparent departures from the plain meaning of the operative sections of the statutes.¹¹ But such an assumption is unrealistic. It is unlikely that members of Parliament or of the cabinet are well acquainted with the judicial interpretation of the statutes. Even if they were, it would not be realistic to expect

that they would be in a position to push for amendments if they were not satisfied with the courts' interpretations. There are many calls upon their energies, and those who desired change would have to create a consensus.

(v) Statements by those who have studied the legislation, its origins, and its administration and enforcement. Notable earlier contributors include Ball (1934); Reynolds (1940); Skeoch (1956, 1966a); Moore (1970); Rosenbluth and Thorburn (1963); and Gosse (1962).¹²

(vi) Statements by Members of Parliament in both the House of Commons and the Senate, largely taken from the times at which new legislation was introduced or amendments made, for example, in 1888, 1889, 1897, 1907, 1910, 1919, 1923, 1935, 1937, 1946, 1949, 1951, 1952, 1960, 1969, 1971, 1975 and 1977. Table 1-1 records the dates when the various substantive sections first came into effect.

Table 1-1: *Origins of the Substantive Sections of Competition Legislation in Canada*

1. Criminal:		
●	Conspiracy (horizontal combinations) ^a	1889
●	Mergers ^b (horizontal or vertical)	1910
●	Monopoly ^b (and monopolization)	1910
●	Predatory pricing	1935
●	Price discrimination	1935
●	Resale-price maintenance and refusal to deal	1951
●	Discrimination in advertising allowances	1960
●	Misleading price advertising	1960 ^c
●	Misleading advertising re deceptive or misleading statements of fact or of guarantees	
●	Deceptive practices	1976
—	Secondary boycotts	
—	Pyramid selling	
—	Referral selling	
—	'Bait and switch' selling	
—	Multiple ticketing	
—	Disclosure in promotional contests	
—	Sales above advertised prices	
2. Civil Reviewable Matters:		
●	Refusal to supply	1976
●	Consignment selling	1976
●	Exclusive dealing	1976
●	Tied sales	1976

Notes

- a. The original conspiracy section had no force until 'unlawfully' was removed in 1900. Bid rigging was made illegal *per se* in 1976.
- b. 'Merger' and 'monopoly' were not given definitions until 1960.
- c. There were forerunners of this provision in the *Criminal Code*; see Cohen (1971).

Sources: Stanbury (1981a); Kaiser (1979).

(vii) The preambles to the actual or proposed legislation, for example, dating from 1889, 1910, 1971 and 1977.

Outline of the Study

This study has been structured around three major and six lesser themes describing the objectives of competition policy; these themes emerged from our analysis of the sources described above. In order to reduce the list of objectives to a reasonable number, we have grouped what we believe to be related themes under a handful of major headings.

Chapter 2 examines the objectives of competition policy as they relate to preventing abuses of economic power and thereby protecting the interests of consumers and of business competitors. It has been argued that Canadians, unlike Americans, have never inherently distrusted power, whether economic, political or social.¹³ The early framers of our 'anti-combines' legislation saw benefits in large aggregations of capital, but they also wanted to ensure that the possession of monopoly power (more generally, market power) was not abused. (At one point Mackenzie King spoke of "undue abuse", thus suggesting that a certain amount of abuse was acceptable.) Specifically, legislators in 1889, 1910 and 1923 wanted to see that concentrations of economic power did not (unduly) disadvantage consumers and primary producers. Monopolistic pricing to the disadvantage of consumers was the principal evil to be prevented. In addition, the legislators wanted to ensure that businessmen (often small, local firms) were left free to compete as they saw fit, and were not coerced into participating in cartels or subjected to predatory or exclusionary practices by those with market power.

Chapter 3 describes in some detail the principal judicial interpretation of the objective of competition legislation in Canada: "maintaining free competition". As we shall see, this term is used in almost every combines case from 1903 to the 1970s. Free competition is seen by the judges to be a public right established by

Parliament and designed to protect the public from undue restraint of trade. The doctrine also incorporates a concern for those firms and individuals subject to the coercive behaviour of those wishing to restrain trade collectively by illegal means. The early cases make it clear that judges were particularly offended if the members of a conspiracy sought to include others in it against their will or took punitive action against those who wished to act independently.

In Chapter 4 we examine the last of the major objectives of competition policy, that is, economic efficiency. As we shall see, efficiency has a number of dimensions, including static allocative efficiency (that is, the optimal level of output), technical efficiency (that is, the lowest cost of production and distribution at the level of the firm), and dynamic efficiency. The last concept is concerned with efficiency over time and incorporates technological and organizational change. Economic efficiency is one of the more recent of the major objectives of Canadian competition policy. Although long advocated by economists, it was only in the amendments and proposed amendments of the 1970s that economic efficiency can be said to have become the primary objective of the policy.

In treating each of these major themes (in Chapters 2, 3 and 4), our approach is to proceed chronologically so that the time-dependent nature of the stated objectives of Canadian competition policy is made evident.

In Chapter 5 we discuss the lesser themes running through Canada's history of competition policy. At various times, and for some of the players at least, the *Combines Investigation Act* or its predecessors were seen as a device to "preserve the free enterprise system"; as the result of a political compromise between producer (business) interests and those of consumers; as a device to protect or advance the interests of small business, a technique to fight inflationary pressures, and a means to ensure fairness and honesty in the marketplace. Chapter 5 also looks at a narrower objective of what was originally called 'anti-combines legislation'. When the first Act passed in 1889, making it a criminal offence to lessen competition "unlawfully" and "unduly", a number of its proponents and supporters stated that the purpose of the statute was simply to declare the English common law against restraints of trade.⁴

In Chapter 6 we draw together both the major and lesser themes by relating the objectives of competition policy to both time and the proponent of each objective (Table 6-1). We also identify the major 'lessons' that seem to come from our analysis and draw our conclusions.

In Appendix A we provide the text of a substantive portion of the

major criminal offences embodied in the *Combines Investigation Act* as of 1 January 1976. In Appendix B we provide a number of tables that describe the enforcement activities under competition-policy legislation.

Notes

1. Referring to the U.S. *Sherman Act*, Professor William Baxter (1978, p. 803) has noted:

From 1890 to the present day there has been one underlying controversy which, at least in its importance, if not in the verbiage devoted to it, both dominates and underlies the many other controversies that have marked the field of antitrust. That fundamental conflict is over the purposes which the antitrust laws should be assumed to serve.

2. In general, in this study, we use the newer phrase 'competition-policy legislation' in place of the older term 'anti-combines legislation', which the former expression replaced in the mid-1960s. In modern usage, 'a combine' usually refers to a horizontal agreement to fix prices or allocate markets among competitors. In the legislation, the original *Combines Investigation Act* of 1910, for example, a combine was defined more broadly to include:

... any contract, agreement, arrangement or combination which has, or is designed to have, the effect of increasing or fixing the price or rental of any article of trade or commerce or the cost of the storage or transportation thereof, or of the restricting competition in or of controlling the production, manufacture, transportation, sale or supply thereof, to the detriment of consumers or producers of such article of trade or commerce... and also includes what is known as a trust, monopoly or merger.

The legislation itself remains in the *Combines Investigation Act* R.S.C. 1970, c.C-23, amended by c.10 (1st Supp.); c.10 (2nd Supp.); S.C. 1974-75-76, c.76; S.C. 1976-77, c.28. See Appendix A. In organizational terms, the administration and enforcement of the legislation has been conducted by the Bureau of Competition Policy in the Department of Consumer and Corporate Affairs since 1967. See Gorecki and Stanbury (1979a) and Gorecki (1981a).

3. We are reminded of the story of a man talking to three stonemasons working on a cathedral in the fourteenth century. When asked what he was doing, the first stonemason replied, "Building a wall." The second said, "I'm building a cathedral." The third stonemason responded "I'm building a great monument to the glory of God."

4. It is interesting to note that Canadian judges follow the English tradition and refuse to examine the legislative history of a statute, including the words spoken in the debates surrounding its passage, except in constitutional cases. See Hudon (1977). They prefer to focus upon the 'plain meaning of the words' as passed by the legislature in seeking to understand the objectives of a statute. See Skeoch (1966a). American judges are much more eclectic and often examine the legislative history of a statute at some length. See, for example, *United States v. Brown Shoe* (1962) 370 U.S. 294.
5. See the discussion in Stanbury (1976, 1983).
6. See, for example, Reynolds (1940); Rosenbluth and Thorburn (1963); and Stanbury (1977a).
7. There have been a number of such studies in the United States. See, for example, Bork (1966, 1967, 1978); Elzinga (1977); Kintner (1978); Thorelli (1955); Letwin (1955); Pitofsky (1979); Stone (1977); Blake and Jones (1965); Dewey (1965); Kauper (1980); Rowe (1980); and Schwartz (1979).
8. The first competition legislation was enacted in 1889. See Baggaley (1982) and Ball (1934). No provision, however, was made by the federal government for its administration and enforcement. It was to be enforced by the provincial attorneys-general. See the discussion in Gorecki and Stanbury (1981c).
9. We note also that in the Board of Inquiry into the Cost of Living (Canada, 1915), minor mention was made of competition policy. The same is true of the Royal Commission on Prices (Canada, 1949). There were a number of other studies published along with the Skeoch-McDonald report in 1976. See Williams (1976); Whybrow (1976); Cohen and Ziegel (1976); Edwards *et al.* (1976); and Trebilcock *et al.* (1976).
10. We note, however, that annual reports were produced for the fiscal years 1909/10 and 1910/11. The latter can be found in Sessional Paper No. 36c A.1912, 2 George V. The former was contained in a chapter in the *Annual Report of the Department of Labour* for the year ending 31 March 1910, pp. 89-94.
11. It is obvious that one of the primary motivating forces for the Minister of Consumer and Corporate Affairs (Canada, 1981b) was his unhappiness with the Supreme Court of Canada's decisions in three important cases: *K.C. Irving* (1977) 32 C.C.C. (2d) 1; *Aetna Insurance* (1977) 34 C.C.C. (2d) 157; and *Atlantic Sugar* (1981) 54 C.C.C. (2d) 373; 16 C.R. (3d) 128 (1980). See the discussion in Cairns (1981a, 1981b, 1981c); Reschenthaler and Stanbury (1977, 1981); Roberts (1977); Engelhart (1981); McFetridge and Wong (1981, 1982); and Stanbury and Reschenthaler (1981).
12. Our own work along these lines may be found in Gorecki and Stanbury (1979a); Stanbury (1976, 1977a, 1983); and Gorecki (1981a).

13. See, for example, Westell (1982). We would note, however, that people in western Canada seem to have slight populist leanings.
14. As we shall discuss in more detail, Professor Richard Gosse (1962) indicates that this view was mistaken. It is interesting that the framers of the *Sherman Act* of 1890 in the United States held the same view, although s. 1 of that statute made *all* agreements, combinations or conspiracies in restraint of trade subject to both criminal and civil law. See Walker (1910) and Bork (1978).

2: *Preventing Abuses of Economic Power*

Perhaps one of the most important and consistently restated objectives of Canadian competition policy is that it is designed to prevent abuses associated with the exercise of economic power. In general, it would appear that Canadians have not been inherently distrustful of large-scale enterprise or even the combination of otherwise independent firms: see, for example, the Royal Commission on Corporate Concentration (Canada, 1978).¹ For many, mergers, even of direct competitors, are both inevitable and desirable. With this belief, however, goes the recognition that not all the effects of large-scale business enterprise nor all the effects of combinations are beneficial, particularly to consumers, to farmers and to other competitors. From the earliest times (for example, the parliamentary debates of 1888), it is clear that Canada's law on restraints of trade was aimed only at preventing the *undue* lessening of competition and at preventing the more serious abuses that can flow from the possession and exercise of market power. There never has been an attempt to reduce market or aggregate concentration as a philosophical objective. (See Chapter 5.) The benefits of the concentration of economic power, it was — and is — believed, are so apparent that public policy ought to be aimed at preventing the few, but more obvious, abuses.²

What abuses is it the objective of the law to prevent? The list that follows is not exhaustive, but it is indicative of the major issues described by those who have seen competition policy legislation as designed to prevent abuses of market power:

- Increased prices, the almost inevitable result of agreements in restraint of trade. One particular version of this abuse blamed the National Policy of tariff protection³ (originating in 1879) for the combines that were able to raise prices.⁴
- The redistribution of income away from consumers in favour of producers. This move is obviously related to the ability to raise prices above competitive levels. In its stronger forms this type of redistribution was called 'larceny' or the 'fleecing' of consumers. In more recent times, the concern has been to see that consumers received some of the benefits of economies of scale resulting from mergers or specialization agreements.
- Agreements among buyers (usually wholesalers or food processors), designed to reduce the prices paid to farmers while at the same time keeping the prices paid by consumers high
- The use of 'unfair' business tactics such as predatory pricing, loss-leader selling, exclusive-dealing contracts, price discrimination, and refusal to deal, to curb the competitive behaviour of firms unwilling to engage in agreements in restraint of trade⁵
- Misleading advertising and deceptive trade practices; for example, the use of misleading or factually incorrect statements to change the purchasing decision of the consumer. (This issue emerged only in the 1960s.)

The First Two Decades: 1888–1910

In general, we shall proceed chronologically and so weave together the various perceptions of what constitutes the abuses of economic power that competition-policy legislation was — and is — supposed to prevent. The first competition legislation, passed in 1889, resulted from the *Report* of a special committee of the House of Commons in 1888. In moving that the special committee be established, Conservative M.P. N. Clarke Wallace remarked:

The question of the nature and the extent of the various combines in this country demands at the hands of this Parliament the fullest investigation, not only because it affects the issue as to whether the people are to pay higher prices for manufactured articles and other products under the influence of these combines and trusts, but also because in it are involved the important interests of public morality and personal freedom of action. (CD,⁶ 29 February 1888, p. 28.)

He went on to state that "certain combinations⁷ of persons engaged in the same lines of trade and business are necessary and proper . . . [but some combines] not only . . . regulate the prices at which the manufacturers shall sell, but also the prices at which the dealers are bound to sell." (CD, 29 February 1888, p. 28.) Wallace, in the last few words, was referring to what we now call 'resale-price maintenance'. (Despite large numbers of complaints to the federal authorities in the 1920s, 1930s and 1940s,⁸ this restrictive trade practice was not to be prohibited in Canada until the end of 1951.)

The day before Mr. Wallace made his motion, Mr. Mitchell, a Liberal M.P., alleged that there were combines in washing machines, cotton, flour, sugar, rubber, shirts and in undertaking. He complained, "We cannot even get buried on moderate terms now, though, no doubt, the Government would like to bury some of us." (CD, 28 February 1888, p. 24.) In the debate on Wallace's motion, Mr. Lister, a Liberal M.P., charged that the National Policy of Sir John A. Macdonald came about when Canadian manufacturers contributed election funds to the Conservatives and were rewarded after the election by tariff protection. (CD, 29 February 1888, p. 32.)

Two days after the special committee reported in May of 1888, Wallace, who had been its chairman, introduced a bill (No. 138) "for the prevention and suppression of combinations formed in restraint of trade." The "serious evil" this bill was designed to attack was the widespread existence of "combinations formed in order to enhance prices and restrict production, and keep out others from engaging in the same occupation and business. . . ." (CD, 18 May 1888, p. 1544.) Sir Richard Cartwright described the combines documented by the special committee as "the natural fruits of the absurd system of protection under which we are at present living." (*Ibid.*, p. 1545.)

During the debate on Second Reading of the same anti-combines bill reintroduced⁹ in 1889, Wallace reviewed some of the evidence, amounting to more than 700 pages, collected by his committee in 1888. He described, for example, how a coal combine in Ottawa raised prices from \$6.00 per ton to \$8.50; how, after the advent of a combine, binder twine increased in price by about 50 per cent, despite the fact there had been no increase in the cost of raw materials; and how a salt combine was able to double the price of the commodity by contracting for the entire output of Canadian wells. (CD, 8 April 1889, pp. 1111-12.) In supporting Wallace's bill, Mr. Guillet emphasized the two types of abuse that the legislation was designed to prevent: the exaction of high prices from consumers and the coercion of rival businessmen who wished to be free to compete. Mr. Guillet said the subject of combines,

... is a matter which has excited the interest of the entire people throughout this Dominion, for all classes and sections feel that they are being oppressed by unreasonable exactions from the operation of these combinations. ... this Act is intended to suppress the combinations of these gentlemen who have had their hands in the people's pocket so long, and to compel them to withdraw their hands. Competition safeguards the prosperity of the country; it is the life of trade. ... In the formation of these combines there has been unwarranted interference with freedom and civil rights. It is not to be borne that people should be compelled to pay so large an increase on the price of these articles and be subjected to insufferable exactions, as have been those who refused to enter the combines. (CD, 8 April 1889, pp. 1114, 1115.)

Unfortunately, Mr. Guillet's assertion that "these combines will no longer exist after the Bill becomes law" (CD, 8 April 1889, p. 1115) was more pious hope than reality.

Mr. Sproule, the Liberal M.P. for East Grey, who was to become a tireless supporter of effective anti-combines legislation, emphasized that it is the forces of competition that protect everyone from the abuses of economic power:

... competition is the only guarantee we have that the article produced will be given to the people at the least possible price. We only need look at the success that has attended these [combines] throughout Canada and the United States, and European countries; we need only look to their success to know that the aim they have had in view has been accomplished, and the result has been ... to bring back millions of capital to the pockets of those parties who are engaged in these combines. (CD, 22 April 1889, p. 1442.)

The bill as enacted was not a strong one. Members of a combine had to be found to be lessening competition "unlawfully" and "unduly" or enhancing prices "unreasonably". The well-known business historian Michael Bliss (1973, p. 179) is of the view that:

The basic reasons for this less than half-hearted legislative response to the recommendations of the Select Committee of 1888 stemmed from the kinds of combination uncovered in that investigation and the arguments made in their defence. Despite the committee's conclusion that new legislation was needed, it had not in fact uncovered a particularly alarming situation.

In the debate in the Committee of the Whole, Mr. Mulock saw the Wallace bill as designed to protect consumers:¹⁰

... there is necessity in my judgment for intervention to protect the consumers of the country. We have seen in the last few years gigantic institutions and corporations forming combinations to enhance the cost of the necessities of life, and I see very little distinction between what is called in the criminal law, larceny, and the result of an arrangement which obliges the unfortunate consumer to transfer from his pocket to that of the wealthy producer an unnecessary amount of money in order that he may maintain life. (CD, 22 April 1889, p. 1440.)

Even in the Senate, usually thought to represent the interests of business and of 'men of property', the Wallace bill had some support. Senator McCallum said, "A certain ring controls the products of the country and will sell at certain prices. If this Bill has the effect of stopping that practice in the slightest degree it is desirable that the [Senate] should pass it." (SD, 29 April 1889, p. 635.) Senator DeBoucherville, in distinguishing between reasonable and unreasonable combinations, stated that "the only thing we have to deal with [is] to prevent these companies from combining in view of imposing higher prices on the public." (SD, 29 April 1889, p. 639.) He thought that "there are combinations which are perfectly honest, and which often prevent the ruin of companies."¹¹ (*Ibid.*, p. 639.)

During debate in 1890 on a bill to amend the Act of 1889 by deleting the words 'unduly' and 'unreasonably', Senator Read described how a wholesale grocer had to pay eighty cents per barrel more for sugar because he refused to join a refiner-wholesaler combine. He went on to say, "when the masses are forced to put their hands in their pockets and contribute to the coffers of such a combination, I think it is the duty of Parliament to step in and redress the grievance." (SD, 7 May 1890, p. 714.) Later in the debate, he related how the undertakers' combine required potential entrants to obtain the approval of at least three of the four members of the association nearest their place of business and to receive the approval of the association. Suppliers to the undertaker, such as casket makers, who sold their wares to firms who were not members of the association, were to be boycotted by members. (*Ibid.*, pp. 716-17.) Senator Smith, on the other hand, defended combines that were "reasonable and proper" in these words:

What would our country be without combines? Combinations in a legitimate way are reasonable and proper, whether they be combines of laborers, farmers or [sugar] refiners — they are good if they are not carried to too great an extent. . . . Has not everything that is great and successful something of a nature of a combine about it, in a reasonable and legitimate way?¹² (SD, 7 May 1890, pp. 718, 722.)

Senator McCallum had a less benign view of combines: "There are combinations, of course. For what? For the benefit of the consumers in this country? No; combinations of the rich, in order that they may put more money in their own pocket." (SD, 7 May 1890, p. 724.) As he saw it, the amending bill was a "measure in the interest of the large consuming population of Canada. . . ." (*Ibid.*, p. 728.) Senator Perley, an avowedly strong supporter of the National Policy, who recognized that a strong anti-combines bill would result in higher prices for a time at least, also wanted such a bill.

We are now met with monopoly to still keep up the high prices, and the argument that I advanced that over-production would keep down prices is killed at once, because we have undertaken to maintain and sustain a monopoly in this country which I know has for its purpose the keeping up of prices beyond what they ought to be. (SD, 7 May 1890, p. 743.)

In 1891, when he again attempted to amend the Act of 1889 by deleting 'unduly' and 'unreasonably', Mr. Wallace described the effects of a salt combine. It doubled the price of salt from \$0.55 to \$1.10 per barrel sold at the wells. (CD, 20 July 1891, p. 2553.) Mr. Mills argued that tariff reductions would be more effective than an amended Act. (*Ibid.*, pp. 2256–59.) Mr. Gillmore made the same argument. (*Ibid.*, p. 2561.) Mr. Davies (P.E.I.) saw the Act of 1889 as aimed at combines that unreasonably raised prices:

The real object. . . was to punish combinations which had for their object the intent of withdrawing enormous and improper sums from the people's pockets, of forming corners and making the people pay double the price. . . .¹³ (*Ibid.*, p. 2577.)

In 1897 the Liberal government of Sir Wilfred Laurier introduced amendments to the *Customs Tariff Act*; these amendments were designed to remove or reduce the tariff protection where the Cabinet had reason to believe:

...that as respects any article of commerce there exist any trusts, combination, association, or agreement of any kind among the manufacturers of such article, or the dealers therein, or any portion of them, to enhance the price of such article or in any other way to unduly promote the advantage of such manufacturers or dealers at the expense of the consumers. . . .¹⁴ (CD, 22 April 1897, p. 1139.)

A bill with a similar objective had been introduced by Mr. Edgar in 1889. (See CD, 22 April 1889, p. 1438.) In 1897 the Minister of Finance, Mr. Fielding, gave the following rationale for the amendments:

One of the evils of the protective system is that it inevitably leads to the formation of combines; and I am unable to see how, by any other procedure than this, we can effectually reach them. There is nothing so likely to prevent the formation of combines in our country as the recognition of the fact, by manufacturers and others who may engage in forming combines for unduly enhancing the prices of commodities, that the duty on like articles imported into the country can be removed by Order in Council. I believe that to be the most useful agent we can have to prevent the formation of combines. (CD, 2 June 1897, p. 3250.)

The Minister of Marine and Fisheries, Mr. Davies, echoed these words, stating, "We do mean to give the consumer a chance to live." He pointed out that the section would be invoked "only when prices are unduly enhanced to the consumer".¹⁵ (CD, 2 June 1897, p. 3268.)

Perhaps because of the nature of partisan politics, both Mr. Wallace and Mr. Sproule (CD, 2 June 1897, p. 3298), strong supporters of anti-combines legislation, thought the amendments to remove tariff protection would provide little protection for consumers. On the other hand, Mr. Craig emphasized the beneficial nature of combines: "combines sometimes . . . enable the cost of goods to be reduced to the public, and the public benefit by them". (*Ibid.*, p. 3258.) He went so far as to argue that combines which increase prices are "perfectly legitimate". He continued:

This may appear to be a strange statement, yet it is a fact. Manufacturers, for example, may be cutting prices so that some of them will have to go under. They meet and say: we cannot go on in this way, it is impossible to continue, and we must come

to some arrangement and agree not to sell under certain prices. No injustice was done, because the prices were already too low; yet those men would bring themselves directly under this clause, and if the Government were informed, they might see reason to believe that an agreement existed among those manufacturers to increase the prices of those articles. (CD, 2 June 1897, p. 3260.)

In 1900 the word 'unlawfully' was deleted from section 520 of the *Criminal Code*. (The word had been embodied in the Act of 1889.) Despite this deletion, the enforcement of the competition legislation suffered from a major defect. It relied on individuals complaining to the relevant provincial attorney-general, who was expected to enforce the federal law.¹⁶ Although there was only one prosecution — and that unsuccessful — before 1900,¹⁷ seven were conducted between 1903 and 1910, and five convictions were obtained.¹⁸

The Combines Investigation Act of 1910: The Stamp of Mackenzie King

The Liberal government's Minister of Labour, W.L. Mackenzie King, in January 1910, introduced the *Combines Investigation Act* into Parliament. It was designed to provide a means — albeit a most cumbersome one — to undertake the investigation of alleged combines in restraint of trade. It also offered a broad definition of combines, including monopolies, trusts and mergers, because as King rightly remarked, "human ingenuity has devised a great many forms of combination for the purpose of effecting an increase in prices, or the restriction of competition . . ." (CD, 18 January 1910, p. 2057.) Even in his statement of First Reading, King was at pains to distinguish his bill from the legislation in other countries¹⁹ in that:

. . . it is not aimed against combines or mergers as such, but rather against the exercise on the part of combines, mergers or monopolies, in an unfair manner, of the powers which they may get from that form of organization . . . This measure seeks to afford the means of conserving to the public some of the benefits which arise from large organizations of capital for the purpose of business and commerce. (CD, 18 January 1910, p. 2057.)

In the Committee of the Whole, on 12 April, King delivered a four and one-half hour speech in support of his bill. Largely in view of the 1910 Debates, but also in view of those of 1923, when the *Combines Investigation Act* was re-enacted, L.A. Skeoch (1966a, p. 22) was able to state:

One of the major strains running through the debates is the argument that public detriment is fundamentally generated by the deliberate exploitation by businessmen of positions of economic advantage — the 'abuse theory' of detriment.

Early in his long speech of 1910, King noted the association in the public mind between the rapid rate of inflation at that time and the recent large wave of mergers.²⁰

It is this question of the cost of living which has helped to make the question of combines, monopolies, trusts and mergers and the possible effect they may have on prices, so important. In the popular mind there has come to be a gradual association between these two phenomena. In the first place, people have experienced the rise in prices, and in the second place, they have observed the formation in increasing numbers of these large aggregations of capital, and they have got it into their minds that these two phenomena are associated one with the other. (CD, 12 April 1910, p. 6803.)

He then repeated his argument that the bill was not intended to legislate against combines as such. Instead, he said, "the legislation we are proposing is legislation which will afford an examination²¹ into the business of every large concern, where there is reason to believe that a combine is operating to an undue disadvantage of the public. . .". (CD, 12 April 1910, p. 6810.)

Note that only when a combine was operating to the *undue disadvantage* of the public was it to be subject to public scrutiny. The implication is that a certain amount of exploitation of a position of market power is acceptable because of the presumed benefits of combines. King repeated his theme when he said that his legislation was "not aimed against combinations as such, but against the abuse of their power by combination." (CD, 12 April 1910, p. 6813.)

King obtained a Ph.D. in economics from Harvard in 1909. (Reynolds, 1940, p. 137, n. 11.) It seems evident that he intuitively understood what today is described as 'tariff limit-pricing by oligopolists',²² for he observed that:

... where you limit competition from without and manufacture is carried on within by only a limited number of producers, a very strong inducement is put in the way of the men controlling these industries to unite their forces and to see that they get to themselves as far as they can, the full benefit of any increased price which the tariff may permit. (CD, 12 April 1910, p. 6823.)

King made it clear that the legislation was designed to protect consumers and farmers: "In this legislation it is the interests of the consumer and producer, rather than the interests of the investor or stockholder that it is hoped to protect." (*Ibid.*, p. 6830.) It is important to recognize that at the time King spoke, the term 'producer' meant a farmer. One of the main groups arguing for the new legislation was the farmers. For example, Vincent Bladen (1932, p. 71) comments:

An agrarian revolt was developing against the policy of protection and against the monopolies which were supposed to flourish under such protection. . . . A deputation led by Mr. E.C. Drury, then a high official in the Grange, waited on the government at Ottawa in 1909 to ask that a special officer be appointed to investigate monopolies. . . .²³

One of King's archetypical statements on the purposes of the *Combines Investigation Act* was made in the 1910 debates as follows:

The one end and purpose of this legislation is to prevent the mean man from profiting in virtue of his meanness, and I know of no way by which that can be more effectively done than by providing some kind of machinery which will enable an intelligent public opinion to be formed and focussed upon the particular evil which you are endeavouring to stamp out. Penalties are frequently of no service towards that end, but publicity is all important and essential. . . . (CD, 12 April 1910, p. 6858.)

Mr. Clark (Red Deer) was much more pragmatic. He said, "the real evil which the government is trying to get at is the cause of the increased cost of living. That is the real trouble." (CD, 12 April 1910, p. 6864.) Mr. Haggart also had a clear idea of what the proposed legislation of 1910 was supposed to do: "This Bill is for the purpose of punishing parties who enhance the prices of commodities which are useful to the community, such as food." (*Ibid.*, p. 6870.) He recognized, however, that "you must state specifically what you

intend to legislate against. . . . you must be specific in your description of the crime in order to punish it."

Mr. Wright, a Conservative M.P., saw the problem as the higher prices exacted by the combines, regardless of the presence or absence of tariff protection:

The idea prevails pretty generally that the consuming public of this country are being taxed unduly by what are generally termed combines. . . . I believe that all combines have the effect of enhancing prices to the consumer.²⁴ I do not care whether the combines are entered into in Great Britain, or in Canada, or in the United States. I do not care what kind of trade policy a country may have, when these combines are brought into play they have the effect of lessening competition, and when you lessen competition I think the natural outcome is an increase in price. (CD, 12 April 1910, pp. 6892, 6895.)

King was not alone in trying to distinguish between 'good' and 'bad' combines. Consider the following statement by Mr. Macdonald:

If you have a combination of men in any business who combine together with the avowed object of increasing the price of any of the articles of necessity in life, that is an agreement against the state and the state should deal with it accordingly; but where, on the other hand, you have combinations such as I have indicated, existing in the various trades in England and in Canada, for their common interests, or for the purpose of saving fixed charges which are always an important consideration in manufacturing, for the purpose of obtaining the advantage of the knowledge and experience of men interested in trade together, there is a very marked line of divergence and that line should be maintained; we should hesitate before combining these two things together and dealing with them on the same basis. (CD, 12 April 1910, p. 6920.)

Mr. Blain, the M.P. for Peel, argued that the problem was one of enforcement, and that the proposed mechanism in the 1910 legislation relied greatly on the initiative of individuals. He said:

. . . what the people of Canada are looking for is not new legislation, but enforcement of the existing legislation Instead of the government striking at these evils with the ample machinery [through the Department of Labour] at present under their

control, they are simply introducing a new remedy so as to lead the people of Canada to think that they are doing something for them. . . . the Minister of Labour . . . has chosen to place another law on the statute-book which he asks the people to enforce [by establishing a *prima facie* case before a judge who would then order an investigation, *not* a prosecution], and not the government whose duty it is to enforce these laws. (CD, 12 April 1910, p. 6877.)

Mr. Sproule, however, recognized the weaknesses in the Act of 1889 even after its crucial amendment in 1900. It relied on the provincial attorneys-general for enforcement, and it was very difficult to prove what was meant by unduly lessening competition or unreasonably enhancing prices. (CD, 12 April 1910, p. 6887.) Mr. Barker (*ibid.*, p. 6906) made the same point concerning 'unduly'.

We note that during the clause-by-clause debate on the bill, King, exhibiting the caution for which he became famous, was reluctant to expand the concept of 'detriment'²⁵ to include both agricultural producers and consumers. He said:

The main purpose of this measure is the protection of the consumer. Doubtless features of this measure may be applicable to a wider range of conditions, but as it is experimental legislation it might be as well to begin with one class . . . (CD, 25 April 1910, p. 7882.)

A few minutes later he repeated, "the measure is intended primarily for the protection of consumers against the possible advantage which may be taken of them by combines. It is not intended to go further than that at the present time." (*Ibid.*, p. 7883.)

Mr. Borden, Leader of the Opposition, argued in support of the inclusion of the term 'producer' in the concept of detriment. He stated:

. . . I understand that the injurious effects of a combine may be roughly speaking divided into two classes; in the first place, an undue increase in the price to the consumer; and in the second place, an undue decrease of the price to the persons who produce the raw material, and which the combine works up into the finished article and places on sale. (CD, 25 April 1910, p. 7898.)

But, finally, as noted above, King agreed to the inclusion of the term 'producers' in the Act.

The *Combines Investigation Act* of 1910 established the first specific mechanisms for enforcement. (See Gorecki and Stanbury, 1981a.) Responsibility was assigned to the Department of Labour, of which Mackenzie King was Minister. The first annual report on the administration of the Act of 1910 contained a statement on the objectives of the legislation. It reflected King's views as to the purpose of the new Act:

... to place at the disposal of the people a readier and, it is believed, a more effective means than is now available in Canada of disclosing and of remedying the abuses of combines which may be formed whether as corporations, monopolies, trusts or mergers, or in the looser forms of agreements, understandings, or arrangements, for the purpose of unduly enhancing prices or of restricting competition to the detriment of consumers or producers.²⁶

The new procedures for enforcing the law were to prove unsatisfactory.²⁷

The Second Combines Investigation Act, 1923

The inflation induced by World War I and the perceived need for more active government intervention resulted in new competition-policy legislation. The *Combines Investigation Act* of 1910 was repealed by the *Combines and Fair Prices Act* of 1919. The latter (along with the related *Board of Commerce Act*) was declared unconstitutional in 1921 by the Privy Council.²⁸

The *Combines Investigation Act* of 1923²⁹ provided another occasion for Mackenzie King, now Prime Minister, and other M.P.'s to explain the objectives of the legislation. Once again King argued that the purpose of the legislation was to obtain the benefits of combinations (including mergers and trusts) and also to prevent the abuses possible from such large aggregations of economic power. Again he argued that the law could be drawn so as to distinguish between 'just' combinations and those which abused their position.³⁰ He said that the proposed Act,

... proceeds broadly on the theory that in this age of commercial and industrial competition, not merely between industry and industry and locality and locality, between the industries of one province and those of another, but between the industries of one country and those of another, the industries

one might almost say, of one continent and those of another, large combinations of capital organizations of business in a large way, are an absolute essential if the business of our country is to hold its own in competition with the business of other countries. But just because it is recognized that it is necessary to have these large organizations of business, so the government recognizes that some restraint must be placed on the possible abuse of great power which may come into their hands. The legislation does not seek in any way to restrict just combinations or agreements between business and industrial houses and firms, but it does seek to protect the public against the possible ill effects of these combinations. (CD, 7 May 1923, p. 2520.)

The M.P. for Cape Breton South and Richmond, Mr. Carroll, echoed the theme that "the present bill is primarily and mainly . . . for the protection of the consumers of Canada . . ." He went on to distinguish between 'good' and 'bad' combines as had Mr. King:

Combinations of capital have done much to lessen the cost of certain articles which are among the necessities of life in Canada, and to that extent the combination of capital is a splendid thing. But when capital combines to enhance the price of the necessities of life, when it combines to take the last cent out of the consumers of Canada, then I say that such a combination should be declared a crime by this parliament, and I want to congratulate the government on bringing down legislation with that object in view. (CD, 7 May 1923, p. 2529.)

Mr. Carroll was critical of the fact that prosecutions under the proposed Act of 1923 were still to be left in the hands of the provincial attorneys-general but, he stated, "if this legislation is properly enforced, it will be a very great blessing to the great mass of the consumers of this country — and we are all consumers." (CD, 7 May 1923, p. 2532.)

If Mr. King and Mr. Carroll could see the potential abuses of combines, Mr. Marler (St. Lawrence-St. George) could not:

. . . I do not think that combines, mergers and trusts so-called have increased materially the cost of living, because when one comes to think of it a combine, trust or merger of various interests more or less spells efficiency, more or less brings about the cheapening of production and bringing about the cheapen-

ing of production brings about the fact that more labour can be employed. (CD, 7 May 1923, p. 2537.)

Apparently the benign view of the activities of combines was too much for the M.P. for Qu'Appelle, Mr. Millar. He said in reply:

I have been struck with the amount of eloquence poured out in order to whitewash these combines. . . . these combinations, or some of them, have been abusing their powers. . . . we have an opportunity, and the House is being put to the test, of passing legislation which will really have a kick in it. . . . at the present time we can buy no article the price of which has not been fixed arbitrarily. (CD, 7 May 1923, p. 2546.)

He stated, however, that if the Act were to be properly enforced, "the consuming public will be filled with confidence." (CD, 7 May 1923, p. 2548.)

On the other hand, Mr. Healy (North Essex) charged that the country was "tired of anything that smacks of uplift legislation, anything that has a tendency to appear as muck-raking legislation." (CD, 7 May 1923, p. 2555.) Yet Mr. Healy said he agreed with the general principles of the bill and was prepared to punish businessmen who broke the law.

I believe manufacturers and business men are just as honest as any other class of citizens in this country. I suppose there are amongst manufacturers and business men the same proportion of crooks—perhaps no more and no less—as there are amongst professional men, newspaper men and farmers. Therefore, I believe it is necessary to have legislation to catch crooks wherever they are, and to punish crooks when they are caught. (CD, 7 May 1923, p. 2556.)

He recognized that a maximum fine of \$25 000 on corporations, "if they are powerful and wealthy enough . . . is not sufficient punishment . . .". (CD, 7 May 1923, p. 2556.) He wanted to imprison the responsible officers "in case they are found guilty, just the same as any other porch-climber or burglar would go to gaol in case of an ordinary theft."³¹ (*Ibid.*, p. 2556.)

Despite the fact that the proposed *Combines Investigation Act* of 1923 was supposedly designed to improve the administration and enforcement of the competition legislation, the Leader of the Opposition, Arthur Meighen, thought it would be ineffective. He said:

I think it was Mr. Balfour who stated that the most foul smelling of platitudes was this continual talk about "a square deal and justice" with no reference to specific enactments. This bill, to my mind, instead of being a measure seeking to get concrete results is a measure distinctly seeking to avoid them. (CD, 7 May 1923, p. 2557.)

The Minister of Labour, James Murdock, who introduced the proposed Act of 1923 and who would be responsible for its administration, also distinguished between 'good' and 'detrimental' combines:

I would not, however, Mr. Speaker, have one hon. member in this House draw the conclusion from anything I might say that all combines, all so-called monopolies, all price fixing arrangements, and all re-sale price arrangements are detrimental to the interests of the public. I do not believe any such thing. (CD, 7 May 1923, p. 2562.)

Mr. Murdock had been a member of the ill-fated Board of Commerce established in 1919 by the Unionist government of Sir Robert Borden.³² The Board was responsible for the administration of the *Combines and Fair Prices Act* of 1919, which replaced the *Combines Investigation Act* of 1910.

For some M.P.'s, at least, the *Combines Investigation Act* was a 'great white hope' that would stem the 'depredations' of combines. Mr. Forke (Brandon) gave a farmer's perspective when he said:

I have raised big crops and small crops; but I have always found at the end of the year's transactions, that matters have been so manipulated that only a bare living has been left to the man who has produced the wealth. That is why we want to get to the bottom of combinations in restraint of trade or for the purpose of taking undue advantage of the privileges they have acquired. (CD, 8 May 1923, p. 2581.)

Mr. McMaster (Brome) thought that the bad elements of combines outweighed the good, and that the legislation was necessary to protect consumers.

... I am sure, absolutely convinced that the economic and industrial life of Canada is honeycombed with combines and rings of all sorts. I do not think there is any possibility of dispute so far

as that is concerned. It has been said that all combines are not bad. That may be true. There may be that *rara avis* in our economic life, the beneficent combine, the gathering together of manufacturers or middlemen for the purpose of reducing costs of production or of distribution and of giving the benefit of that reduction to the consumer. I would gladly welcome the acquaintanceship of such a combine . . . But I am afraid that a calm and cool survey of the situation will bring most of us to the unbiassed conclusion that as a rule combines are not made for the purpose of reducing prices but of maintaining or raising them. There is therefore obviously some necessity for somebody to control combines. (CD, 8 May 1923, p. 2582.)

Mr. McMaster saw as the objective of the legislation, "not the reduction of prices irrespective of what the goods cost, but a fair deal for the consumer as well as for the producer". (CD, 8 May 1923, p. 2583.) Mr. Church (North Toronto) called for more stringent enforcement of the legislation, including the use of grand juries under a broadened section 498 of the *Criminal Code*.³³ In his view, "There is no country in the world to-day in which the big interests flourish like a green bay tree, without let or hindrance, as they do in the Dominion of Canada. Canada is the happy hunting ground for all these American trusts and combines." (CD, 8 May 1923, p. 2584.)

The Conservative M.P. for St. John City, Mr. Baxter, aptly summarized the widespread view that the law has aimed only at *abuses* of economic power:

. . . even at the risk of uttering some generalities, I think I may say that the speakers have been generally, if not entirely, in accord in recognizing as perhaps fundamental that combines, trusts and mergers are not necessarily injurious to the public interest. On the other hand, it is common experience that under certain circumstances, and carried on in a certain way, combines, trusts and mergers may produce a very great injury to the public. (CD, 8 May 1923, p. 2589.)

Even those much more critical of combines focused their support of the legislation on the issue of exorbitant prices and profits. Mr. Lewis (Swift Current) stated: "Combinations may be necessary in the industrial life of the country but when they operate unjustly the people should be given a chance to escape from the extortionate charges which these combines often exact instead of remaining satisfied with legitimate profits." (CD, 8 May 1923, p.

2601.) Mr. MacLean (Prince, P.E.I.) said he wished manufacturers would be "satisfied with a fair profit and not exact exorbitant rates from the consuming public." (*Ibid.*, p. 2602.)

With the drumbeat of a modern radio or television commercial, Mackenzie King reiterated his 'prevention of abuses' approach.

The Canadian parliament in 1909 was virtually the first parliament to take the attitude that it was not proper to legislate against combinations as such, but rather that it was from the point of view of guarding against the ill effects of large combination that legislation of this kind should proceed. It has now become pretty generally accepted that that is the correct point of view to adopt.³⁴ (CD, 8 May 1923, p. 2602.)

He was critical of the U.S. *Sherman Act*.³⁵ He said that it started with the view that "combinations of large business interests were an evil" and that its enforcement was an "impossibility" because of this.³⁶ (CD, 8 May 1923, p. 2602.) The proposed Act of 1923 was to protect the long-ignored public.

Labour, capital and managerial ability each claimed its share of consideration in the distribution of the fruits of industry, but the public was left to shift for itself. So far as this legislation is concerned, it is brought forward in the name of that fourth party, in the name of the public without whom neither labour nor capital nor managerial ability could accomplish or achieve anything. (CD, 8 May 1923, p. 2603.)

King accepted the view that "by large combination and price fixing you may help to bring about in industry a stability which otherwise it might not possess, as well as economies and increased efficiency." (CD, 8 May 1923, p. 2606.) He also thought, however, that through the same methods, "men who are not actuated by a public spirit . . . may carry their price fixing . . . to the point of monopoly in a manner which will be detrimental to the public interest . . .". (*Ibid.*, p. 2606.) This seems to suggest that a little price fixing is a good thing, at least in so far as it achieves economic stability. Carried to its logical extension, however, it must be condemned as against the public interest.

In August 1923 Mr. Harry Hereford was appointed Registrar of the *Combines Investigation Act* of 1923. He was to hold that position as well as that of Industrial Engineer in the Department of Labour, which he had held previously. In his first *Annual Report*, the Registrar emphasized that apart from formal proceedings,

... there is value in the moral effect which the enactment of this law has upon business in general through the instrument which has been placed at the disposal of the public (the six-citizen complaint procedure) for its own protection against combines of a detrimental nature.³⁷

No mention was made concerning the objectives of the legislation in the *Annual Reports* of the Registrar until 1930/31, and that reference was oblique:

As opposed to such a policy of close supervision of industry, the Combines Investigation Act is being administered in the belief that, in so far as is consistent with public well-being, business should govern itself, and that governmental interference is necessary and justified only when there are indications of public injury or public danger.³⁸

In the 1932/33 Report, the Registrar stated that the Act was administered by "examining each case with the purpose of determining whether by means of combination the regulative effects of competition have been lessened or prevented to the detriment of the public."³⁹ It seems clear, however, from reading the *Annual Reports* in general, that "the public" included both consumers and business enterprises hurt by the coercive behaviour of rivals.⁴⁰ This is, of course, consistent with the views expressed by M.P.'s during debates on the legislation.

In the following year, 'detriment' was defined to include "fixing common prices or monopolizing, controlling or otherwise restraining trade."⁴¹ In the 1935/36 Report, tabled by the short-lived Dominion Trade and Industry Commission, this list was extended to include "enhancing prices, preventing competition (or) limiting production."⁴²

The 1935 Amendments

In mid-1935, four months before the Conservatives were replaced by the Liberals, the government of R.B. Bennett passed two important pieces of competition legislation. Section 498A was added to the *Criminal Code*, prohibiting price discrimination and predatory pricing.⁴³ The *Combines Investigation Act* of 1923 was amended and placed under the administration of the Dominion Trade and Industry Commission established at the same time. Under the *Dominion Trade and Industry Commission Act*, the federal government sought

the power to permit industry agreements to prevent "wasteful" or "demoralizing" competition. The Act was declared unconstitutional in 1937.⁴⁴

The 1937 Amendments

Having failed, because of the opposition of the Senate, to amend the Act in 1936,⁴⁵ the Liberal government of Mackenzie King introduced a more comprehensive set of amendments in 1937. The amendments provided the Minister of Labour, under whose department the Act was again to be administered, an opportunity to restate the abuse theory of detriment interpretation of the purpose of the *Combines Investigation Act*. The Honourable Norman McL. Rogers stated:

It cannot be made too clear, Mr. Speaker, that the purpose of the present bill is not to prevent or discourage trade combinations, or to condemn large organizations of business merely because of their size. Expansion of business has been a part of the development of recent years in this and other countries. Large scale business enterprises of themselves need not operate to the public detriment. Unquestionably some of them may operate to the public advantage through the economies which are brought about through the large scale operations they conduct.⁴⁶ There is nothing in the bill which condemns monopolies, trusts or mergers as such. The purpose rather is to bring this particular type of organization within the scope of the legislation in order that, if a monopoly, trust or merger should be controlling prices to the public detriment, investigations may proceed under the act and penalties may be applied if the offence has been committed.⁴⁷ We are anxious rather to prevent abuses of powers than to pillory or to describe as unlawful a particular form of economic organization. (CD, 1 March 1937, p. 1350.)

R.B. Bennett, now Leader of the Opposition, defended the Trade and Industry Commission he had set up in 1935. As he saw it, the Commission would be effective against unfair competition.⁴⁸ He said:

...as business has progressed the main complaint to-day is against unfair competition. This is one of the matters engaging

the attention of economists everywhere We have to maintain a decent standard of living and by the supervision now provided by [the Dominion Trade and Industry Commission]. . . we have endeavoured to prevent what might be called cut-throat competition which might result in the creation of a monopoly far worse than any possible combine. (CD, 1 April 1937, p. 2425.)

Even the Leader of the democratic socialist CCF Party, Mr. Woodsworth, allowed that, "if the competitive system is a good thing, we must in some way seek to avoid unfair competition." (CD, 1 April 1937, p. 2430.) The problem, of course, is that as a practical matter it is very difficult to distinguish 'unfair competition' from the normal price competition that characterizes markets in which sellers have no market power. The difficulty is greater when an industry is in disequilibrium because, for example, of excess capacity or of technological or organizational innovation. Under such circumstances, the less efficient firms will go to the wall. Obviously, this is a painful process for the owners and employees of such an enterprise. Not surprisingly, they are likely to bring pressure to bear on politicians.⁴⁹

What Is the Public Interest?

Since the first *Combines Investigation Act* was passed in 1910, it has been explicitly concerned with prohibiting restraints of trade that have operated (or are likely to operate) to the detriment or against the interest of the public. But what is the 'public interest' in the context of restraints of trade? During debate on Second Reading of the 1923 Act, Mr. Stevens pointed out there was no definition of 'detriment' in the bill. (CD, 7 May 1923, p. 2525.) A few minutes later, Mr. Stevens said that his "chief criticism of the bill [is] that in effect it declares to be a crime that which is, without question, ordinary, sound business sense." (*Ibid.*, p. 2526.) He pointed with approval to the growing tendency of businessmen to eliminate "vicious, useless competition — competition which simply seeks to slay a competitor." In his view, such agreements by businessmen improved the efficiency of distribution and stabilized both prices and production. (*Ibid.*, p. 2526.) In general, Stevens thought the days of open competition had passed.⁵⁰

Fourteen years later, M.P.'s were still struggling with the meaning of the public interest in competition legislation. In the debates on the 1937 amendments, Mr. Kinley stated:

The purpose of this bill is to protect the public interest, but sometimes it is hard to designate just what is the public interest. Many times the public interest is a divided interest as between different elements in the community. What I might think was eminently in the public interest, some one else might think was not. The whole thing is left in a fog of uncertainty. (CD, 1 April 1937, p. 2442.)

During debate on the 1946 amendments to the Act, a Vancouver M.P., Mr. Merritt, pointed out that the courts were being asked to determine what Parliament had not itself defined: the 'public interest'.⁵¹ He said:

... where in the Combines Investigation Act there are found such words as "or is likely to operate to the detriment or against the interests of the public, whether consumers, producers or otherwise," there is thrown upon the court, not the duty of determining that a certain fact or agreement exists but rather the duty of determining what we in this parliament so far have been unable to determine, whether the agreement or the facts as found by the court are in the interests or against the interests of the Canadian people. (CD, 2 July 1946, pp. 3054-55.)

Mr. Merritt might also have noted that Parliament did not, as well, give the courts any guidance as to what constitutes an agreement or arrangement to lessen competition 'unduly'.⁵²

Protecting the Interests of Consumers

The idea that consumers are to be protected from the abuses of economic power, as we have seen, goes back to the passage of the first anti-combines legislation in 1889. In 1910 Mackenzie King emphasized that "the main purpose of this measure [*the Combines Investigation Act*] is the protection of the consumer." While varying in intensity, the theme continued to be found from the 1940s to the end of the 1970s.

In a speech to the Ottawa Women's Forum in 1946, Commissioner McGregor said, "the principal purpose [of the legislation] is to protect consumers [by which term he meant housewives and their husbands and families] from the kind of excessive prices that result when people who sell the same kinds of things get together and decide what the prices shall be."⁵³ Later in the speech, he emphasized that such agreements are criminal only if they operate to the

detriment of the public, whether consumers, producers or others, or if competition is lessened unduly. McGregor (1946b, p. 5) also pointed out that, "oddly enough among the most vocal defenders of the competition system are to be found men who are doing their utmost to prevent competition from controlling their own prices."

T.D. MacDonald, who succeeded McGregor as Commissioner and became Director of Investigation and Research when that position was established in 1952, usually emphasized the efficiency objectives of competition policy and the public's right to free competition, rather than the interests of consumers as such. At the same time, in many of his more than twenty public speeches over a decade, MacDonald saw the purpose of legislation as prohibiting certain types of business behaviour. He focused on the four major 'don'ts' or 'four simple rules' in the legislation.

- (1) Suppliers of goods who account for a substantial part of the market are not allowed to agree among themselves to fix prices, limit production or distribution or prevent entry into the trade.
- (2) A person is forbidden to acquire or exercise a monopoly position in any industry or trade, in a manner detrimental to the public.
- (3) A supplier is forbidden to set resale prices for his goods and insist upon his trade customers following such resale prices.
- (4) A supplier is not allowed to discriminate among his trade customers who are competitors of each other by holding out to one of them a price concession not available to the others if they are willing to buy the same quantities; neither is a supplier allowed to sell at prices lower in one part of the country than in another or anywhere at prices unreasonably low where his purpose is the elimination of his competitors. (MacDonald, 1954, p. 3.)

He emphasized that the first rule occupied most of the time of his staff. The prohibition of these practices directly or indirectly benefits consumers as a class.

By the 1980s, perhaps driven by the desire to reduce the opposition of much of the business community to new, tougher competition legislation, the Minister of Consumer and Corporate Affairs emphasized that both business and consumers benefited from competition:

It is undoubtedly true that the ordinary Canadian consumer will certainly be the ultimate beneficiary of any measures which

are effective in ensuring the existence of a reasonable degree of competition in the marketplace.

But I think it is also true that by far the greater proportion of Canadian enterprises have an even more immediate, direct and compelling interest in the maintenance of the competitive system both with respect to their own sources of supply and the outlets available for the sale of their goods or services. (Ouellet, 1981a, p. 13.)

The passage of amendments to the *Combines Investigation Act* in the 1960s and in 1975, which were designed to curb misleading advertising and deceptive trade practices, marked a radical departure in meeting the objective of preventing abuses of economic power. No longer was the focus on abuses of economic power that followed from monopoly, large agglomerations of economic power, or conspiracy, but on a particular practice that could be conducted by a single seller with little economic power through a newspaper advertisement. The relevant sections of the legislation have been enforced vigorously. For example, between 1960/61 and 1969/70, the federal government completed 43 combines cases. Between 1970/71 and 1982/83 the number was 160. In contrast, 76 misleading advertising cases were completed between 1960/61 and 1969/70. The number rose to 624 in the period 1970/71 through 1976/77, and 823 were completed between 1977/78 and 1982/83. (See Appendix B.) One commentator, in surveying consumer-protection legislation relating to false advertising, was led to remark that the *Combines Investigation Act* is "the most important of the federal laws in this domain." (Cohen, 1971, p. 103.) In contrasting the Act with other laws, he noted that, "unlike the other statutes, which deal with specific products or the media, the *Combines Investigation Act* is broad, even sweeping, and encompasses the advertising of all goods promoted in all media and, then, by almost any means." (*Ibid.*) It is against this background that our discussion of misleading advertising and deceptive trade practices takes place.

The substance of the 1960 amendment⁵⁴ is contained in section 33C (1), which reads as follows:

Every one who, for the purpose of promoting the sale or use of an article, makes any materially misleading *representation* to the public, by any means whatever, concerning the *price* at which such or like articles have been, are, or will be, ordinarily sold, is guilty of an offence punishable on summary conviction. (Emphasis added.)

In 1969 section 33D was added to the Act;⁵⁵ its subsection (1) contained the essence of the amendment:

Every one who publishes or causes to be published an *advertisement* containing a statement that purports to be a statement of *fact* but that is untrue, deceptive or misleading or is intentionally so worded or arranged that it is deceptive or misleading, is guilty of an indictable offence and is liable to imprisonment for five years, if the advertisement is published

- (a) to promote, directly or indirectly, the sale or disposal of property or any interest therein, or
- (b) to promote a business or commercial interest. (Emphasis added.)

Section 33D was broader than section 33C, which referred only to price. On the other hand, section 33D was narrower in scope because it referred only to 'advertisements' while section 33C referred to 'representations'. A final point of contrast was that while section 33C was completely new, section 33D was formerly section 306 of the *Criminal Code*. However, although section 306 had existed in one form or another since 1917, only one reported case is to be found under section 306. (Cohen, 1971, p. 118.) By transferring administrative authority to the Director of Investigation and Research, better enforcement was hoped for and, indeed, realized, as we have noted above. There were some shortcomings in sections 33C and 33D, such as the reference to 'advertisement' in section 33D. There were, as well, a number of deceptive or misleading practices untouched by the Act. Effective 1 January 1976, as part of the Stage I amendments, the Act was expanded to deal with a wider array of practices: misleading warranties; untrue and misleading tests and testimonials; 'bait and switch' selling; promotional contests; and double ticketing. (Kaiser, 1979.) In the planned Stage II amendments, at one point it was proposed that through class and substitute actions, consumers should be able to seek redress from those who had committed offences under the Act whether or not the offence was misleading advertising.⁵⁶

While there was little debate in Parliament when the legislation was introduced, a number of participants in the competition-policy field have made statements as to the objectives of the misleading advertising provisions. The Director remarked, in discussing sections 33C and 33D:

It is a measure of the importance that Parliament and government have attached to the consequences of misleading advertis-

ing that these two provisions have been inserted in the Combines Investigation Act. The effect of doing so is to give authority as well as responsibility to federal law enforcement officers to police this law as well as to provide for its enforcement the very wide powers of investigation which the Act confers on the Director of Investigation and Research. These provisions relate to the consumer goals⁵⁷ . . . not only by protecting the consumer against fraud and deception but as well by improving the quality of the information which is available to him in making his purchases. (Henry, 1969, p. 7.)

Perhaps the most comprehensive statement by the Director on the goals of all of the Act's misleading-advertising provisions appeared in the July/September issue of the *Misleading Advertising Bulletin* in 1979, under the heading, "How the Misleading Advertising and Deceptive Marketing Practices Provisions of the Combines Investigation Act Serve the Public Interest".⁵⁸

It should . . . be noted that the legislation and its enforcement agency were not created to act directly on behalf of such individuals but, rather, to act generally in the public interest by preventing deceptive practices in the marketplace. The benefits of this action are, therefore, shared by businessmen and consumers alike.

In Canada, the first major impetus toward effective misleading advertising laws came in 1960, and it was due to pressure from business not consumers. Businessmen were concerned that misleading regular price comparisons were making genuine sale advertising less credible to consumers and that these misrepresentations were giving their originators an unfair competitive advantage. Consequently, a section was added to the Combines Investigation Act [s. 33C]. . . .

Other broader provisions were added to the Act at a later date but their passage more clearly recognized the consumer protection aspect of the legislation. . . .

A consumer will allocate his available income in order to maximize his well-being and for such purpose requires adequate product information and effective price competition.⁵⁹ It is therefore evident that clear objective knowledge is vital to efficient performance of the marketplace and that both the consumer interest and the business interest in an honest and fair marketplace are intertwined. When advertising suppresses or distorts relevant product characteristics, the consumer is unable

to make a rational choice and loses confidence in the market information system. Consumer ignorance can also contribute to the creation of oligopolies by limiting price and quality competition and imposing barriers to entry. This important link with competition policy has been recognized in both Canada and the U.S. where administration of the federal deceptive marketing legislation is the responsibility of agencies which are the primary enforcement arms for competition policy . . . ⁶⁰ (P. 3.)

The observation that the courts have noted the two themes "of fair competition and consumer protection" is also pointed out by Ronald Cohen (1971, p. 110) as well as by G.D. Orr. (1975, p. 356.) In introducing section 33C in Parliament, the Minister of Justice, E.D. Fulton, stressed the fair competition and protection of smaller competitors. (Quinlan, 1972, p. 277.)

Although the above citations and commentary give a flavour of the objectives of sections of the Act dealing with misleading advertising, perhaps the most colourful description is to be found in the judgments. An oft-cited passage is taken from *R. v. Colgate-Palmolive Ltd.*, concerning section 33C:

This legislation is the expression of a social purpose, namely the establishment of more ethical trade practices calculated to afford greater protection to the consuming public. It represents the will of the people of Canada that the old maxim, *caveat emptor*, let the purchaser beware, yield somewhat to the more enlightened view *caveat venditor*—let the seller beware. ⁶¹

Alternatively, in a judgment concerning section 33D, Mr. Justice Sinclair of the Alberta Supreme Court commented that "the protection of the section is for 'the public—that vast multitude which includes the ignorant, the unthinking and the credulous'". ⁶²

While the 'credulous man' test has *not* become the standard in judging whether an advertisement is misleading, the enforcement of the two provisions has lived up to the words of the Minister of Justice speaking when section 33D was transferred from the *Criminal Code* in 1969.

I cannot resist saying that the consumer has a fundamental right to correct information and that truth in advertising is essential to any charter for the consumer. I hope these amend-

ments will more effectively protect the consumer's right to correct information in future. The Minister of Consumer and Corporate Affairs . . . and I intend that there shall be vigorous enforcement of these provisions on a national basis. (C.D. 23 January 1969, pp. 4723-24.)

The fact that between 1969/70 and 1982/83 there have been over 1400 prosecutions, and that convictions were obtained in over three-quarters of the cases, attests to the need for the misleading advertising and deceptive practices provisions. Fines at first were low, but it appears that greater familiarity with issues and the economic stakes involved have led judges to increase them in recent years.⁶³ In July 1983, Simpsons-Sears Ltd. was fined \$1 million for twelve counts of misleading advertising with respect to diamond rings.⁶⁴ The previous largest fine for a similar offence was \$85 000.

Notes

1. This probably reflects a broader cultural phenomenon: an acceptance of hierarchy, deference to authority and decision making by elites. See, for example, Friedenberg (1980) and Presthus (1973, 1974). For a variety of appraisals of the Commission's *Report*, see Gorecki and Stanbury (1979b).
2. Two qualifications are necessary here. First, while conspiracies have been illegal only if they "lessen competition unduly" and mergers and monopolies only if they have "operated to the detriment or against the interest of the public", in more recent years, a number of essentially *per se* criminal offences were incorporated into the law. These include price discrimination and predatory pricing (1935), resale price maintenance and refusal to deal (1951), discriminatory advertising allowances (1960), misleading advertising (1960 and 1969, amended in 1976), and a number of deceptive trade practices (1976). See Table 1-1. Secondly, it may well be that because all competition legislation prior to 1976 was incorporated into the criminal law, legislators were reluctant to brand as criminal all but the most flagrant abuses of economic power. The criminal law was used exclusively between 1889 and 1975 for constitutional reasons. See McDonald (1969). On the constitutionality of the Stage I amendments, see Grange (1975) and Hogg and Grover (1976).
3. This policy also fostered a high degree of foreign ownership of the Canadian economy, a fact well recognized by the earliest advocates of the National Policy. See Baggeley (1982).
4. In the debates surrounding the U.S. *Sherman Act* of 1890, a number of Congressmen argued that tariff protection fostered the growth of

- trusts. See, for example, Thorelli (1955); Letwin (1965); and Walker (1910).
5. Thomas Kauper (1980, p. 411) notes, "An emphasis on 'fairness' or freedom of coercion may inject a wholly divergent set of values into a system otherwise directed toward the protection of competition itself."
 6. For economy of citation we have used the following abbreviations: CD = House of Commons, *Debates*; SD = Senate, *Debates*.
 7. Before the turn of the century and until about 1920, the term 'combine' or 'combination' was used to refer to several different things. A combination might refer to what we now call a *merger* of firms that had previously been competitors in one or more markets. The same term was occasionally used to refer to the creation of a new, large enterprise, typically by means of a limited company. In this way many individuals could combine their capital to create a larger firm. Thirdly, the term 'combine' was used to refer to what we would now call a 'horizontal agreement' among competitors. Such agreements or conspiracies among independently owned firms are usually designed to fix prices, allocate markets or restrict the entry of new competitors.
 8. See the *Annual Reports* of the Registrar and the then Commissioner under the *Combines Investigation Act* during the period. Copies of these earlier reports are available in the library of the Department of Consumer and Corporate Affairs, Place du Portage, Phase I, Hull, Quebec.
 9. Although ostensibly supported by the government, Wallace's first bill did not obtain Second Reading in 1888. Carman Baggaley (1982, p. 25) states:

Wallace's Bill (138) consisted of three clauses. The first set out the activities that were declared illegal and specified the punishment; the second declared that any federal incorporated company found guilty of these activities shall forfeit its charter; and the third stated that the Bill was not intended to interfere with *The Trades Union Act* passed in 1872. A curious feature of the Bill was the reference to agreements "with any railway, steamship, or steamboat or transportation company." Nothing had been said during the Select Committee hearings to suggest that any of the combines involved a transportation company. Apparently this reference was a carry-over from the New York State Bill that formed the basis for Wallace's Bill.

The bill as enacted by Parliament was substantially different from the one originally proposed. See Baggaley (1982, pp. 24-29) and Chapter 5 below.

10. Adam Smith (1776, p. 625) specified clearly whose interests were to be favoured in matters of public policy when he said:

Consumption is the sole end and purpose of all production; and the interest of the producer ought to be attended to, only so far as it may be necessary for promoting that of the consumer. The maxim is so perfectly self-evident, that it would be absurd to attempt to prove it. But in the mercantile system, the interest of the consumer is almost constantly sacrificed to that of the producer; and it seems to consider production, and not consumption, as the ultimate end and object of all industry and commerce.

If we substitute the word 'present' for the word 'mercantile', Smith is contemporary as usual.

11. This theme was to reappear as a defence in prosecutions, particularly in the 1930s. See, for example, *R. v. Container Materials* (1940) 74 C.C.C. 113 (trial); (1941) 76 C.C.C. 18 (appeal); and (1942) S.C.R. 141; 1 D.L.R. 529 (SCC).
12. For a modern expression of this view, see Hardin (1974). This theme was to figure largely in W.L. Mackenzie King's views when he introduced the first *Combines Investigation Act* in 1910. See below, and see King (1911, 1912).
13. Adam Smith (1776, p. 61) described concisely the effects of monopoly as follows:

The price of monopoly is upon every occasion the highest which can be got. The natural price, or the price of free competition, on the contrary, is the lowest which can be taken, not upon every occasion indeed, but for any considerable time together. The one is upon every occasion the highest which can be squeezed out of the buyers, or which, it is supposed, they will consent to give: The other is the lowest which the sellers can commonly afford to take, and at the same time continue their business.

14. The provision has been used only once, against a group of newsprint producers at the turn of the century. See Ball (1934, pp. 14-16).
15. It will be noted that a number of proponents of anti-combines legislation have sought to protect the public against 'undue enhancement' of prices. This suggests to us that these people were prepared to accept some increase, attributable to a combine, in prices above the competitive level. However, this view reflects the belief that some benefits flowed from such combines. Hence it was only an 'undue' increase in prices that was to be attacked. Undue exploitation was not to be tolerated. The few 'bad actors' were to be weeded out by criminal legislation. Over half a century later, G. Rosenbluth and H.G. Thorburn (1963, p. 101) were to describe the administrative approach of the 'abuse' theory of detriment resulting from restraints of trade as a "cops and robbers' concept". Under this approach "combines officers are viewed as a species of specialized policemen who enforce a particu-

lar statute by looking for violators, investigating their activities, and bringing them to justice before the courts."

16. Kenneth Elzinga and William Breit (1976, p. 67) point out that the U.S. Congress did not make any appropriations for the enforcement of the *Sherman Act* of 1890 until 1903. Congress apparently believed that the opportunity to bring treble damage actions would ensure that private parties enforced the new law against restraints of trade.
17. *R. v. American Tobacco Company of Canada* (1897) 3 *Rev. de Jur.* 453.
18. See *R. v. Elliott* (1905) 9 O.L.R. 648; 9 C.C.C. 505 (trial and appeal); *R. v. McGuire et al.* (1906) 7 O.W.R. 225; *R. v. Master Plumbers* . . . (1907) 14 O.L.R. 295; 12 C.C.C. 371 (trial and appeal); *R. v. McMichael* (1907) 10 O.W.R. 268; 18 C.C.C. 185; *R. v. Gage* (1907) 6 W.L.R. 19; 13 C.C.C. 415 (trial); (1908) 7 W.L.R. 564; 13 C.C.C. 428 (appeal); *R. v. Clarke* (1907) 14 C.C.C. 46 (trial), 14 C.C.C. 57 (appeal); *R. v. Beckett et al.* (1910) 20 O.L.R. 401, 15 C.C.C. 408. In general, see Gorecki and Stanbury (1981c).
19. The U.S. *Sherman Act* of 1890 contained (and still contains) only two brief substantive sections:

Section 1 Every combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. . . .

Section 2 Every person who shall monopolize, or attempt to monopolize or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. . . .

(In December 1974, a violation was made a felony and the maximum fine was raised to \$1 000 000 for corporations and \$100 000 for individuals. The maximum prison sentence was increased to three years. For a comparison of Canadian and American penalties and remedies, see Tables 7 and 8 in Appendix B.)

In the first case to reach the Supreme Court, *Trans-Missouri Freight Association* (1897) 166 U.S. 29, the Court first declared price-fixing and market-sharing agreements illegal *per se*. Shortly thereafter, the decision was reinforced in the *Addyston Pipe* case ((1899) 175 U.S. 211). Not until 1911, in the *Standard Oil* (1911) 221 U.S. 1, and *American Tobacco* (1911) 221 U.S. 106, cases, did a majority of the Supreme Court establish the 'rule of reason'. See Bork (1978). This rule, which examined the actual effects or intended effects of restraints of trade, did not apply, it must be emphasized, to horizontal or vertical agreements aimed at fixing prices or allocating markets. More generally, see the

cases of *Trenton Potteries* (1927) 273 U.S. 392 and *Socony-Vacuum Oil Co.* (1940) 310 U.S. 150. In general, see Sullivan (1977).

20. See the paper by Weldon (1966). Fred McGregor (1962, p. 40) states that the legislation of 1910:

... was an attempt to curb the current rapid growth of business mergers and monopolies believed to be responsible, in part at least, for the alarming increases in the cost of living that were occasioning much public concern.

King had already instituted an extensive inquiry into wholesale prices, and the results, published in 1910, represented the first of a series of statistical studies that led eventually to the establishment of the Dominion Bureau of Statistics.

Writing at the time the legislation was before the House of Commons, W.W. Swanson (1910, p. 351) described it as "nothing if not novel and progressive; and indicates a real desire on the part of the government to aid the people in their struggle against the continually mounting cost of living."

21. Note the middle word of the title of the Act: it was the *Combines Investigation Act*, and it was patterned on Mr. King's *Industrial Disputes Investigation Act* passed by Parliament in 1907. The mechanism set up by the 1910 Act was cumbersome. (See Ball, 1934.) This fact led some critics to suggest that the legislation was merely an act of symbolic politics.
22. See, for example, Eastman and Stykolt (1967).
23. On the other hand, Mr. King stated that the 1910 Act was Laurier's response to the deputations from the Boards of Trade of Montreal, Toronto, Quebec City and Hamilton, demanding investigation into the portage charges of shipping companies. (CD, 12 April 1910, pp. 6812-13.) King referred to the fact that railway rates were subject to investigation by the Board of Railway Commissioners. In the same speech (*ibid.*, p. 6860), King noted that the proposed legislation had the support of the Dominion Grange and the Dominion Trades and Labour Council.
24. This idea is not new, of course. See the discussion in *Darcy v. Allen* (the case of monopolies) (1603) 11 Coke 84; 77 Eng. Rep. 1260 (K.B.). Important excerpts from this case can be found in Posner (1974). In general, see Von Kalinowski (1981, Vol. 1, pp. 1-4 to 1-37).
25. While the original Act of 1889 as amended in 1900 by deleting the word 'unlawfully' spoke of lessening competition 'unduly' and of raising prices 'unreasonably', the *Combines Investigation Act* of 1910 (as well as that of 1923 and subsequent versions up to 1960) referred to detriment to the public, whether producers, consumers or others. Most conspiracy cases until 1960 were brought under the *Criminal Code* (into which the Act of 1889 was incorporated in 1902). Merger and

- monopoly cases were brought under the *Combines Investigation Act*; hence they were subject to the public detriment test. See MacCrimmon and Stanbury (1978) and Stanbury (1978a).
26. Department of Labour, *Annual Report*, for the year ended 31 March 1910, p. 89. This statement was repeated the next year.
 27. There was only one investigation under the Act of 1910: that of the United Shoe Machinery Corp. See Ball (1934, pp. 44–48); Gorecki and Stanbury (1981c); and the *Report of Proceedings Under the Combines Investigation Act* for the year ended 31 March 1911, an Appendix to the *Annual Report* of the Department of Labour, 1910/11.
 28. *In Re the Board of Commerce Act, 1919* and *The Combines and Fair Prices Act, 1919* (1922) 1 A.C. 191; (1921) 60 D.L.R. 513. The activities of the Board of Commerce are described in Reynolds (1940, pp. 141–45) and in Traves (1974a, 1974b). See also Chapter 5, below.
 29. Lloyd G. Reynolds (1940, pp. 145–46) describes the political environment in which the *Combines Investigation Act* of 1923 was enacted.

The bill encountered vigorous opposition. Powerful newspapers misrepresented it completely. Deputations of protesting businessmen visited Ottawa. Circulars were distributed to members of Parliament. Most Conservative members of the House opposed it strongly, as did several Liberal members from manufacturing areas. The strongest supporters of the bill were Progressives and Liberals from western Canada. In spite of this opposition, Mr. King and Mr. Dandurand, Liberal Leader in the Senate, steered the bill through without substantial alteration.

30. Mr. Woodsworth, one of the founders of the CCF party, and a long-time M.P., asked how one was to separate the sheep from the goats, that is, tell a 'good' combine from a 'bad' one:

The Prime Minister says that he does not seek to prevent just combinations, but what does he mean by just combinations? Who is to decide what is just? . . . The fact is that we have to deal with an existing institution, a combination, and we do not get very far by saying that it is just or that it is unjust. It is in its very nature a form of industrial organization which gives power to a limited group, and as the process goes on, the power becomes so great that the public welfare is threatened. (CD, 7 May 1923, p. 2552.)

Mr. Woodsworth believed that combination and co-operation would take the place of competition. He believed also that even "thorough-going regulation [was] futile." What he wanted was direct government control: "If we are to have combinations, let us have combinations that we can control. Let us have combinations and let us appoint officials to administer them who will decide their policies with a view to the public interest." (CD, 7 May 1923, p. 2552.)

31. The whole matter of penalties and remedies under the *Combines Investigation Act* is discussed in Stanbury (1976, 1983). See also Tables 7-B, 8-B and 9-B in Appendix B. We note that between 1890 and 1955 the maximum fine per count under the *Sherman Act* was \$5 000 for corporations or individuals. See Elzinga and Breit (1976, p. 55). The maximum period of imprisonment was one year for each count. (*Ibid.*, p. 30.)
32. See the discussion in Traves (1974a, 1974b).
33. The original act of 1889 was incorporated into the first *Criminal Code* in 1902 as ss. 517-520. These were later renumbered, and the key offence section became s. 498. See Stanbury (1981a) for details. Until 1960 there were somewhat similar prohibitions against combines in both the *Combines Investigation Act* and the *Criminal Code*.
34. Presumably, King was aware of the 'rule of reason' adopted by the U.S. Supreme Court in 1911. See note 19, above. More generally, see Bork (1978). The view enunciated by King was also widespread in the United States at the time. See Thorelli (1955).
35. The origins of the *Sherman Act* are described briefly in Bork (1978) and in more detail in Letwin (1965); Walker (1910); and Thorelli (1955). See also Gordon (1963a, 1963b).
36. King misstates the mainstream of U.S. thinking. See Thorelli (1955). He confuses price-fixing conspiracies, monopolization and mergers resulting in a high degree of concentration.
37. *Annual Report of the Registrar, Combines Investigation Act*, for the year ended 31 March 1924, p. 2.
38. *Annual Report of the Registrar . . .*, for the year ended 31 March 1921, p. 21. Note that in 1925 Fred A. McGregor, previously Mackenzie King's secretary, was appointed Registrar.
39. *Annual Report of the Registrar . . .*, for the year ended 31 March 1933, p. 7.
40. This point is reinforced by the indictment in the *Canadian Import* (British anthracite coal) case ((1933) 61 C.C.C. 114, (1935) 62 C.C.C. 342), where the public was specifically defined to include "consumers, other dealers in coal and in coke, and others". (*Annual Report of the Registrar . . .*, for the year ended 31 March 1935, p. 3.)
41. *Annual Report of the Registrar . . .*, for the year ended 31 March 1934, p. 1.
42. *Annual Report of the Dominion Trade and Industry Commission*, for the year ended 31 March 1935, p. 1.
43. This provision is discussed in some detail in Chapter 5. The present version of these provisions is found in Appendix A. The original legislation was part of Bennett's "New Deal" for Canada. See Forster and Read (1979). Alvin Finkel (1979, p. 11) notes that Bennett was a shareholder in 52 companies and the majority shareholder in E.B.

Eddy Match Co., which was subsequently convicted of being a monopoly. See *R. v. Eddy Match* (1952) 104 C.C.C. 39; 17 C.P.R. 17 (trial); 109 C.C.C. 1; 20 C.P.R. 107 (appeal). Leave to appeal to the Supreme Court of Canada was refused.

44. See *Reference re Dominion Trade and Industry Commission Act, 1935* (1936) S.C.R. 379; (1937) A.C. 405. A brief description of the Act can be found in Stanbury (1981a).
45. See CD, 11 June 1936, p. 3601; SD, 17 June 1936, p. 524; 19 June 1936, pp. 541, 543, 544, 548, 592, 595; CD, 20 June 1936, pp. 3992, 4035, 4036.
46. This theme, the value of economies of scale associated with large enterprises, was to figure prominently in Bills C-42 and C-13 introduced in 1977. See the papers in Rowley and Stanbury (1978), and in Prichard, Stanbury and Wilson (1979). For a discussion of the importance of economies of scale in Canada, see Gorecki (1976).
47. We are struck by the remarkable similarity of these two sentences to the language used by Mackenzie King in 1910. See the text above.
48. More generally, see McConnell (1971), who compares Bennett's and Roosevelt's "New Deals" and how both sought to administer prices to facilitate recovery to full employment. See also Forster and Read (1979). Note that in 1914 the United States enacted the *Federal Trade Commission Act* to deal with 'unfair competition'.
49. In general, see Courchene (1980), who emphasizes that government is being called upon more frequently to prevent 'adverse' changes in income distribution or to alter the distribution of income to benefit particular groups.
50. See Chapter 5, below.
51. This is a common occurrence. Most legislation establishing government regulation is cast in very general terms such as 'public convenience and necessity' or 'preventing unjust discrimination'. The operational meaning of these terms is left up to the regulatory agencies to whom the legislature delegates the task. See, for example, Economic Council (1979). For a variety of often-conflicting definitions of 'the public interest', see Stanbury (1979b).
52. Between 1905 (*R. v. Elliott*) and 1957 (*Howard Smith*), the courts adopted the test laid down in the former case. In the latter case, Mr. Justice Cartwright, in struggling with the ambiguity of the *Elliott* test, proposed what amounted to a different, tougher, one. In subsequent decisions, the courts tended to follow the definition first established in *Elliott*. The Supreme Court of Canada yoked the two definitions disjunctively in *Aetna Insurance* (1977) 34 C.C.C. (2d) 157, and then again in *Atlantic Sugar* (1980) 16 C.R. (3d) 128. See the discussion in Reschenthaler and Stanbury (1981); Engelhart (1981); McFetridge and Wong (1981, 1982); and Cairns (1981b).

53. McGregor (1946b, p. 1). McGregor's *Annual Report* for 1940/41 contained a longer statement on the objectives of the competition legislation:

The Act is directed toward facilitating the production and distribution of goods at *reasonable prices* by preventing or eliminating injurious monopolies and agreements which unduly limit competition or substantially control the supply of any class of goods to the detriment of the public. Methods of unlawfully lessening competition and controlling trade include arrangements between competitors or others to enhance prices, to fix common selling prices or resale prices, and to unduly limit production or facilities for the manufacturing and distribution of goods. A monopoly, trust, merger or agreement of this type which has operated or is likely to operate against the interest of the public is defined by the Act as a combine. (P. 1, emphasis added.)

In his *Annual Report* for 1941/42, the Commissioner noted that following prosecution of 36 companies and individuals in tobacco manufacturing and wholesaling, price reduction of some 10 per cent in prices of the leading brands had occurred.

54. Section 33C became s. 36 on 15 July 1971. Effective 1 January 1976, it became s. 36 (1) (d).
55. Section 33D became s. 37 on 15 July 1971. The section was extensively amended as part of the Stage I reforms and became s. 36 (1) (a) to (c). See Kaiser (1979).
56. See Reid (1978) and Prichard (1979).
57. The consumer goals that the Director referred to were as follows:

It is essential that, to ensure effective operation of a market system such as we have in Canada, consumers who create the ultimate demand are confident that they are making an intelligent, effective and satisfying choice. To assist in this objective, the Department of Consumer and Corporate Affairs accordingly seeks certain important consumer goals. These are protection against accident and health hazards; to ensure that the market system is kept competitive; to assist the consumer by all reasonable means to make valid choices and judge true prices on the intelligible information; to provide a means for receiving and answering consumer complaints; and finally, to represent the consumer in the deliberations of government. (Henry, 1969, pp. 1-2.)

More generally, see Stanbury and Burns (1982).

58. Pp. 3-4. The *Bulletin* has been published quarterly since 1974 by the Bureau of Competition Policy (Marketing Practices Branch). See also Canada (1983).

59. The Economic Council (1979, p. 48) gave the "inadequate provision of information" as one of the examples of market failure that provides a possible rationale for government regulation.
60. See *R. v. Whitehall Development Corporation Limited* (County Court, Toronto, December 16, 1977. Unreported case (Ottawa: Bureau of Competition Policy, mimeo 271-72).
61. Matheson, Co. Ct., J. (1969) 1 O.R. 731 at p. 733; 3 D.L.R. (3d) 707 at p. 709.
62. *R. v. Imperial Tobacco* (1970) 64 C.P.R. 3 at p. 4.
63. See, for example, Stanbury (1976) and the Bureau of Competition Policy, *Misleading Advertising Bulletin* (April-October 1980).
64. See "Simpsons-Sears Offers Refunds on Diamonds", *Ottawa Citizen* (2 July 1983), p. 3; Frances Phillips "\$1 Million Fine Puts All World on Notice", *Financial Post* (16 July 1983), p. 12; and J. Walker and A.D. Gray, "\$1 Million Ad Fine Signal to Retailers", *Financial Times of Canada* (18 July 1983), pp. 1, 14-15. Note that the department store sold some \$7 million-worth of rings. Hence, it is not clear that the fine (several times larger than the highest in any *combines* case) effectively 'taxed away' the economic gains associated with the ads. Simpsons-Sears announced that it was appealing the fine.



3: *Maintaining Free Competition*

The principal objective of Canadian competition policy, as perceived by the Canadian judiciary, can be summarized in the words 'maintaining free competition'. S.F. Sommerfeld's (1948) conclusion, based on his extensive survey of the cases, needs but little revision in light of our survey of more recent cases.¹ He has stated:

The interest of the public, which it is the purpose [of the legislation] to protect, lies in the preservation of free competition It is the suppression of competition, apart entirely from any effect on prices or, in fact, any objective injury to the public interest, that brings [a restraint of trade under the ban of the legislation]. (Sommerfeld, 1948, p. 444.)

Earlier in his paper, Sommerfeld (1948, pp. 418–19) argued and sought to establish by his review of the cases,

. . . that only one economic theory had received the approval of the courts. That theory is that the public is at all times entitled to the benefit of absolutely free and unrestricted competition, and that any combination that seeks to destroy competition is criminal, whether or not in the particular circumstances of the case the public interest might be better served by the operation of such a combination.

From this statement one could easily draw the erroneous conclusion that Canadian judges have adopted a *per se* approach to price-fixing and market-sharing agreements. That conclusion is

erroneous because at all times Canadian judges have been quite aware that with the exception of one year² (1899), the Canadian legislation declared illegal only those agreements that lessen competition 'unduly' or (in the case of the *Combines Investigation Act* in effect between 1910 and 1960) that operated to the detriment of or against the interest of the public.³ If section 1 of the U.S. *Sherman Act* came to be interpreted as a *per se* ban on price-fixing agreements, the Canadian rule would have to be formulated as 'once undue, then illegal *per se*'.

But we get ahead of our story. The judiciary's perception of the objective of Canadian competition-policy legislation, seen as protecting the public interest in free competition, stems from the second prosecution — and first successful one — conducted under that legislation. In the appeal from the conviction in *R. v. Elliott, Osler, J.A.* stated:

The right of free competition is the right of everyone, and Parliament has now shown [by the amendments of 1900 which deleted the word 'unlawfully'] that its intention is to prevent oppressive and unreasonable restrictions upon the exercise of this right. . . . competition is not to be prevented or lessened *unduly*, that is to say, in an undue manner or degree, wrongly, improperly, excessively, inordinately . . . if by the combination of a few the right of the many is practically interfered with by restricting it to members of the combination.⁴

In this case, 'the right of competition' Osler, J.A. was referring to was the right of coal dealers *outside* the Ontario Coal Association to obtain supplies and to sell in competition with members of the Association. Osler, J.A. concluded that: "The plain object of [the Ontario Coal Association] was to restrict and confine the sale of coal by retail to its own members, and to prevent any one else from obtaining it for that purpose from the [mine] operators and shippers."⁵

In *Shragge v. Weidman*, Cameron, J.A. cited Osler, J.A. in *R. v. Elliott* and concluded that "the intention of Parliament was to prevent oppressive and unreasonable restrictions upon the right of competition."⁶

Free Competition and the Supreme Court

Upon appeal to the Supreme Court of Canada, in the first combines case to be so appealed, Chief Justice Sir Charles Fitzpatrick stated in *Weidman v. Shragge* that "... the mischief aimed at is the undue and abusive lessening of competition which operates to the oppression of individuals or is injurious to the public generally."⁷ He went on to say:

Parliament has not sought to regulate the prices of commodities to the consumer, but it is the policy of the law to encourage trade and commerce and Parliament has declared illegal all agreements and combinations entered into for the purpose of limiting the activities of individuals for the promotion of trade; and preventing or lessening unduly that competition which is the life of trade and the only effective regulator of prices is prohibited.⁸

In concluding his brief judgment, the Chief Justice again emphasized the concept of free competition: "... would any court hesitate to declare [the contract between the two junk dealers] in that it was calculated to unduly impede free competition to interfere with the free course of trade, and to effect a wrongful purpose?"⁹

Undoubtedly, the seminal statement holding the maintenance of free competition to be the primary objective of competition legislation was given by Mr. Justice Duff in his judgment in *Weidman v. Shragge* which concurred with that of the Chief Justice. Duff, J. stated:

The particular sub-section with which we are concerned [subsection 498(d) of the Criminal Code] was plainly intended to protect the specific public interest in free competition. ... I have no hesitation in holding that as a rule an agreement having for one of its direct and governing objects the establishment of a virtual monopoly in the trade in an important article of commerce throughout a considerable extent of territory by suppressing all competition in that trade, comes under the ban of the enactment.¹⁰

In his judgment, Mr. Justice Anglin emphasized that the benefits to the parties to the agreement were to be subordinate to the public interest in free competition. He said:

...the prime question certainly must be does [the agreement], however advantageous or even necessary for the protection of the business interests of the parties, impose improper, inordinate, excessive or oppressive restrictions upon that competition the benefit of which is the right of everyone.¹¹

Professor Richard Gosse (1962, p. 38) suggests that the term 'free competition' itself may well have come into the Canadian judgments from Erle's book *The Law Relating to Trade Unions*, published in 1869. In his opinion, the Chief Justice quotes "from a very recent opinion of an eminent English jurist" in which the term is used, but he does not give the citation. The term can also be found in Adam Smith (1776, p. 61).¹²

In the second combines case to come before the Supreme Court of Canada, *Stinson-Reeb Builders Supply Co. et al. v. The King*, Mignault, J., speaking for a unanimous Court, quoted with approval the words of Anglin, J. and Duff J. in *Weidman v. Shragge*, and then provided an often-quoted summary of the doctrine of free competition:

It may be emphasized here that the advantage thus obtained by the manufacturers and dealers of the association is not the proper test. What is the true test was laid down by this court in *Weidman v. Shragge* as above stated. Injury to the public by hindering or suppressing of free competition, notwithstanding any advantage which may accrue to the business interests of the members of the combine, is what brings an agreement or a combination under the ban of section 498 Cr.C.¹³

The doctrine was reinforced a few years later by Raney, J., in *R. v. Alexander*, who cited the words of Osler, J.A. in the *Elliott* case (cited above) and the words of Mr. Justice Idington in *Weidman v. Shragge* on the virtues of competition. He then went on to say:

Our economic system, as recognized by our laws, is individualistic and competitive, and the Parliament of Canada has said that it is a criminal offence to be a party or privy to or to knowingly assist in the formation or operation of a combine which is, or is likely to be, a detriment to the public interest, and which results from an agreement designed to have the effect of preventing or lessening of competition.¹⁴

This passage was quoted with approval by Laliberté, J. in *R. v. Canadian Import Co. et al.*¹⁵ Subsequently in that case, two justices in

the Court of Appeal¹⁶ reiterated the importance of maintaining free competition by citing with approval the words of Mignault, J. in *Stinson-Reeb* and the three of the members of the Supreme Court of Canada in *Weidman v. Shragge*. In *Hartt and Adair Coal Co. Ltd. et al. v. The King*, Walsh, J.A. restated the rule established in *Weidman v. Shragge*.

The proper test in a prosecution under section 498 of the Criminal Code which deals with "restraint of trade" is the injury to the public by the hindering or suppressing of free competition notwithstanding any advantage which may accrue to the business interests of the members of the combine.¹⁷

Citing both Duff, J. in *Weidman v. Shragge* and the restatement of the rule in *Stinson-Reeb*, Shepherd, J., in the *Imperial Tobacco* case,¹⁸ reaffirmed the doctrine of free competition, despite the fact that he ruled against the Crown on the verdict itself.

As we have seen, the Supreme Court of Canada in *Weidman v. Shragge* and *Stinson-Reeb* enunciated and reinforced the view that Canadian competition legislation existed to protect the public interest in free competition. These rulings were followed in all the lower court judgments that made reference to the issue subsequently through the 1930s. However, it was the *Container Materials* case in the early 1940s that established the trilogy of completely consistent rulings by the Supreme Court, from which there was to be no deviation in the succeeding thirty-five years.¹⁹

The trial court (Hope, J.) cited both the key passages from *Weidman v. Shragge* and *Stinson-Reeb*.²⁰ All three statements by Fitzpatrick, C.J.C., Duff, J. and Anglin, J. in *Weidman v. Shragge* were quoted in full. The Court of Appeal in *Container Materials* dealt less extensively with the issue. However, Robertson, C.J.O. expanded on the meaning of competition — we shall discuss his views below — and Middleton, J.A. quoted Chief Justice Fitzpatrick on the objective of maintaining free competition in *Weidman v. Shragge*.²¹

In the Supreme Court of Canada, another classic statement as to the main purpose of the anti-combines legislation was given by Chief Justice, Sir Lyman P. Duff in the *Container Materials* case:

The enactment before us, I have no doubt, was passed for the protection of the specific public interest in free competition. That, in effect, I think, is the view expressed in *Weidman v. Shragge* in the judgments of the learned Chief Justice, of Mr. Justice Idington and Mr. Justice Anglin, as well as by myself.

This protection is afforded by stamping with illegality agreements which, when carried into effect, prevent or lessen competition unduly and making such agreements punishable offences; and, as the enactment is aimed at protecting the public interest in free competition, it is from that point of view that the question must be considered whether or not the prevention or lessening agreed upon will be undue. Speaking broadly, the legislation is not aimed at protecting one party to the agreement against stipulations which may be oppressive and unfair as between him and the others; it is aimed at protecting the public interest in free competition. That is only another way of putting what was laid down in *Stinson-Reeb Builders Supply Co. v. The King* (*supra*) which, it may be added, was intended to be in conformity with the decision in *Weidman v. Shragge* ²²

This statement was reinforced by Mr. Justice Kerwin (Rinfret, Hudson, and Taschereau, J.J. concurring) when he said:

Under the decision in the *Stinson-Reeb* case, the public is entitled to the benefit of free competition except in so far as it may be interfered with by valid legislation A comparison between s. 498 of the *Code* and s. 498A [which was enacted subsequent to the decision in the *Stinson-Reeb* case] indicates that there has not been any change in the rule.²³

The Meaning of 'Free Competition'

Having consistently stated that the primary objective of Canadian competition-policy legislation is to maintain 'free competition', it seems desirable at this point to try to establish what our judges have meant by this term. With the exception of Mr. Justice Gibson in the *Linen Supply* case,²⁴ no other judge has tried to grapple with the issue in a conscious fashion. Each has acted as if the meaning is self-evident, given the facts of the case. A number, however, have given some clues as to the meaning of the concept of free competition in the course of their judgments.

We have seen that in the *Elliott* case in 1905, Osler, J.A. interpreted what he called the 'right of competition' to be the right of coal retailers who were not party to the agreement to gain access to supplies from mines and wholesalers, and so compete as they saw fit. Canadian judges have been consistently hostile to agreements that operate to discriminate against or restrict the competitive opportu-

nities of rival firms which did not choose to become members of an agreement.²⁵ Those who wish to compete must be left free to do so. This view was also advanced by D.H.W. Henry, Director of Investigation and Research from 1960 to 1973.

Parliament's intention, as expressed in the legislation, has been to create an atmosphere in which those who are willing to compete for economic gain are free to do so. The statute does not require competitors to compete but merely seeks to remove certain classes of restraints on the process of competition.²⁶

Returning to the judges' concept of free competition, we note that in acquitting the defendants, the members of the Ontario Wholesale Grocers' Guild and the Dominion Grocers' Guild, Falconbridge, C.J.K.B. in *R. v. Beckett* concluded his judgment by saying, "It is of the essence of the innocence of the defendants that the privileges which they seek to enjoy should be extended to all persons and corporations who are strictly wholesalers, whether they choose to join the guild or not."²⁷ In other words, because the members of the combine did not coerce competitors not interested in joining it, free competition was maintained. The fact that the Ontario Guild boycotted manufacturers who "declined . . . to confine their sales to the strictly wholesale houses . . ." or required manufacturers or brokers to refuse to sell to price cutters or to sell to them only at a higher price than that offered to the Guild members was apparently ignored by the judge.

In the same case, the law report quotes from the presentation of the two lawyers representing the Crown. Their views help to explain what was meant by free competition in the first decade of this century:

There are certain natural laws of trade which it is important to keep steadily in mind in considering the question of whether there has or has not been a restraint of trade. One is that it is the right of every person to buy where he pleases and sell to whom he pleases and at the best price he can get; another, that he should be permitted to sell his goods where he pleases, and especially for what he pleases. It is the right of every man to go into whatever business he pleases or to remain out of any business he pleases. Trade knows no geographical lines; trade in its natural state flows in all directions, so that any restriction, anything which interferes with the natural flow of trade in any direction, is a restraint of that trade, to a greater or less extent,

depending upon the circumstances. Everything which interferes with the natural operation of these laws is a restraint ²⁸

An almost social Darwinian view of the benefits of free competition was espoused by Mr. Justice Idington in *Weidman v. Shragge* in 1912 when he said:

. . . every step taken in the past to enlarge the bounds of human freedom of thought and action has stimulated discovery and invention, and as a product thereof increased competition, which may have left by the way here and there financial wrecks as the result thereof. This has made men cry aloud in denunciation of the waste of human energy and loss of human comfort resulting from competition. The cry is often a thoughtless one. People raising it seldom reckon with the absolutely necessary waste there is and must ever be incidental to growth, though all nature attests it on every hand. Destroy competition and you remove the force by which humanity has reached so far. The altruism some people would substitute for it may, when it has arrived, bring with it a higher sense of justice, but it has not arrived.²⁹

This passage was quoted with approval by Raney, J. in *R. v. Alexander*.³⁰ He went on to argue that competition provides:

. . . the incentive to struggle which is one of the conditions of advance, not only in the realm of nature, but in the realm of industry. Without that incentive, as the naturalists point out, men would sink into indolence and the more gifted would not be more successful in the battle of life than the less gifted. It follows that there should be open competition for all men and that the most able should not be prevented from succeeding best.³¹

It would be inaccurate and unfair to say that Idington, J.'s views as to the nature of competition were properly summarized in the words quoted above. In fact, in the context of the *Weidman v. Shragge* judgment, he set out one of the most sophisticated conceptualizations of restraint of trade of any Canadian judge. Unfortunately, it was one that has never been adopted by his brethren in subsequent decisions. He begins his analysis of the purpose(s) of the legislation as follows:

This being a criminal statute³² we must try to find the vicious purpose aimed at in order to bring parties within its prohibitions. What then are to be the distinguishing features that may in any given case, and must in this case, enable us to determine whether or not it falls within any of the prohibitions of the statute?³³

He then quickly established that it is the *undue* lessening³⁴ of competition that is at the core of the offence.

One thing which must appear in any given case is that the agreement or arrangement is one designed to prevent or lessen competition. It must be also an attempt at which would be an unduly doing thereof, that is agreed upon. It needs neither success nor actual operation nor aught but an agreement to try what if successful would be the unduly preventing or lessening of competition.³⁵

Idington, J. then points out that "the whole business fabric of Canada is founded upon restraint of competition."³⁶ He continued, "We must assume Parliament realized that the unlimited power of competition begotten of combination, and the unlimited right of contract cannot any longer exist together with a full enjoyment of the ordinary results of competition . . . and hence a new statutory crime had to be created."³⁷ The judge next made it plain that the legislation was clearly designed to prevent combinations that would "crush out competition". Then he went on to delineate a number of the "subsidiary methods commonly in use to promote the ends such combinations are directed to . . ."³⁸

It is here that Idington, J. demonstrated that breadth of vision³⁹ of what constitutes an effective restraint on competition that is virtually absent in judicial decisions in the 1970s and early 1980s. These restraints include:

. . . the purchase or lease of factories to hold them in idleness; the combinations to fix prices, and to refuse to deal with any one who will neither accede thereto nor join the association, nor submit to undertaking for an observance of their rules; the restrictive contracts in sales; and the rebates given, or shifting rates of profit conditioned upon the observance of the terms imposed relative to resales and thus and thereby covering the fixed or variable prices, and the lists of parties or classes of people not to be dealt with, or alone to be dealt with . . .⁴⁰

He also included abuse of both the patent and the incorporation laws. In summary, the aim of the legislation "was to put out of business use the methods of men banding themselves together to render it difficult if not impossible to become rivals, and stop competition in the same field of business."⁴¹

Mr. Justice Idington recognized both the interim and longer term effects of these restraints: "...though some of the public may reap for a time the benefit of such proceedings, it means later on the payment by the public of much higher prices than in a fair competition at a fair continuous normal rate of profit would have to be paid"⁴²

On occasion, the Canadian courts have expanded on the meaning of the term 'free competition'.⁴³ In the *Container Materials* case, in the context of reviewing the range of competitive variables, such as price, quality, terms, that had been the subject of agreement by the conspiring firms, Robertson, C.J.O. stated:

Competition from which everything that makes for success is eliminated except salesmanship is not the free competition that s. 498 is mainly designed to protect. It brings to the customer no opportunity to buy at a lower price or on better terms, or to buy better or more attractive goods for the same money, and this is one of the principal benefits to be had from free competition. The chief factor in increasing sales under conditions such as prevailed under this arrangement is mere salesmanship. Competition of this restricted kind resembles the competitions one reads of among the agents of one insurance company as to who shall write the most insurance in the year, all competition in benefits granted the persons insured being prevented by law.⁴⁴

In the *McGavin Bakeries* case, McBride, J. indicated that "some of the main elements of free competition in the manufacture and sale of bread and bakery products, wholesale and retail . . . are (a) price — including the willingness to be satisfied with a lesser profit, (b) quality or value, (c) service, and (d) salesmanship. . . ."⁴⁵ In his view, these elements would apply "to many, if not all industries in Canada and elsewhere." In the baking industry, McBride, J. concluded, "price transcends all the others combined" and that "without genuine and active competition in price . . . with each . . . firm setting its own price based on the efficiency of its operations and in the exercise of its independent judgment . . . the other elements wilt [and] become of negligible value"⁴⁶

In the *Northern Electric* case, a few years later, the defendants

argued that there was no restriction of production, no allocation of production, no restriction on technological improvements, no restriction on quality, no agreement on the extension of credit, although "the discounts and terms of payment were defined and fixed." Chief Justice McRuer indicated that the importance of price in the meaning of free competition depended upon the nature of the commodity that was the subject of the agreement:

The agreement must be looked at in all its aspects and consideration may be given to the character of the article which is the subject of the agreement and the evidence, as it does here, may indicate that price looms as a very large element in the restriction affecting the 'specific public interest in free competition' or the 'benefit of free competition'. It may be that in commodities of certain types, price competition is the only real competition that is in any way beneficial to the public while in commodities of other types the competitive price may be a minor factor. It is one thing to agree on a common price for women's dresses or hats sold according to size, texture and quality or material where style has an infinite appeal, and another thing to agree on the price of copper wire sold by the ton according to standard specifications.⁴⁷

In the *Wire Fencing* case, Judson, J. cited the views of Robertson, C.J.O., quoted above. He then went on to say that in the case at hand there was "no competition at all in the particular aspect of these businesses with which the public is most interested, and that aspect, of course, is price and quality, and terms of sale and these were agreed upon and were uniform throughout the period [1933-1951]."⁴⁸

The importance of price was also emphasized in the *B.C. Sugar* case. Although he acquitted the firm on charges of merger and monopoly, Williams, C.J.Q.B. made this observation: "It is, I think, correct to say that one of the most important elements to be considered in dealing with competition is its effect on prices of the commodity being considered. It is, perhaps, the most important element."⁴⁹

As Mr. Justice Gibson has wisely remarked in the *Linen Supply* case, "the judicial concept of 'free competition' has a meaning which is not precisely equivalent to any other concept employed and understood by various experts in the social sciences and other experts in their respective fields. . . ."⁵⁰ He went on to say that "the public interest in 'free competition' is sought to be protected by the courts

in Canada by relying on the market to give the kind of business performance considered desirable." Mr. Justice Gibson then analysed the economic meanings of monopoly, pure competition, oligopoly and monopolistic competition. He concluded:

'Free competition' as understood by the courts is not identified with 'pure competition' as meant by economists as defined above. Instead, it is identified with 'monopolistic competition' as meant by economists. The typical and most frequent outcome of 'free competition', in fact, in Canada, is such 'monopolistic competition'.⁵¹

After some additional discussion he then stated:

'Free competition' as judicially understood, affirmatively may be stated, as a situation in which the freedom of any individual or firm to engage in legitimate economic activity is not restrained by (1) agreements or conspiracies between competitors, or (2) by predatory practices of a rival, contrary to the *Combines Investigation Act*. And 'free competition' thus understood is quite compatible with the presence of monopoly elements, as understood by economists, in the economic sense of the word monopoly, for the antithesis of the economic conception of monopoly is not 'free competition', as understood by the courts, but 'pure competition'.

Thirdly, it is not monopolistic power as an analytical concept but monopolistic power in its collusive aspects in a particular market as described, injurious to the public — against the public interest — that is the issue in a restrictive trade case such as this; or putting it another way, such monopolistic power against the public interest, in the cases, has been considered by the courts as the antithesis of 'free competition'.⁵²

This is a useful summary of an important judicial doctrine, the meaning of which was taken to be self-evident in most combines judgments. In Gibson, J.'s view, there are two elements to the judicial concept of 'free competition': (i) the absence of agreement among competitors; and (ii) the absence of predatory practices contrary to the *Combines Investigation Act*. In his view, if firms are free to compete and their activities are not restricted by agreements among competitors or by illegal predatory practices,⁵³ the Canadian courts will find that 'free competition' exists.

The Doctrine of Free Competition, 1950–1977

When combines prosecutions resumed after World War II,⁵⁴ the maintenance of free competition was endorsed as the principal objective of the competition legislation. McBride, J. in *R. v. McGavin Bakeries Ltd. et al.*, restated the doctrine as follows:

Apart from any earlier law in force in Canada, for 62 years by statute [*i.e.*, since 1889], competition with respect to 'any article or commodity which may be a subject of trade or commerce' has been the *right* of everyone in Canada and every person or corporation invading that right by conspiring, combining, or agreeing or arranging with another to unduly lessen or prevent that competition is guilty of a crime involving severe punishment. The importance attached by the people of Canada to jealously guard and preserve this right, and to the prevention and suppression of combines and monopolies, is reflected in a number of other and subsequent statutes enacted by Parliament, all directed to the same end, *e.g.*, the *Combines Investigation Act* of 1910. . . .⁵⁵

Mr. Justice McBride ruled that the type of competition envisaged by the legislation "is free, active and vigorous competition, untainted and untrammelled by any agreement or arrangement [simply designed to benefit the members of the conspiracy]."⁵⁶ He cited in support the rulings in the *Elliott* (1905) and *Stinson-Reeb* (1929) cases.

In the *Eddy Match* case, the trial judge, Bienvenue, J., cited with approval the words of Chief Justice Fitzpatrick in *Weidman v. Shragge*, Mignault, J. in *Stinson-Reeb*, and Chief Justice Duff in *Container Materials*.⁵⁷ Although this was a monopoly-monopolization case (the first such prosecuted), in the Court of Appeal, Casey, J.A., took as his "starting point the fundamental principle that everyone is entitled to the benefits that flow from free competition."⁵⁸ He then referred to the *Elliott*, *Weidman v. Shragge*, *Stinson Reeb* and *Container Materials* cases and concluded, "From this it follows that anything which limits or restricts this freedom of competition is an encroachment on the public right."

As we have indicated, in conspiracy cases, the offence lay in lessening competition 'unduly'. As *Eddy Match* was a monopoly case conducted under the *Combines Investigation Act*, the test of illegality was — and is — whether the monopoly operated to the 'detriment of the public'.⁵⁹ Some qualification of the doctrine of free competition was made clear by Casey, J.A. when he stated:

By enacting the *Combines Investigation Act*, Parliament has given evidence of its acceptance of the fundamental principle. At the same time, however, it has refused to label as an evil to be avoided, all encroachments on the public right. Only those which cause or are likely to cause detriment are forbidden.⁶⁰

The difference may not be as important as it first appears. First, in a number of conspiracy cases brought under the *Combines Investigation Act* between 1910 and 1960, the judges held that the 'public detriment' test in the Act was essentially the same as the test of 'unduly' lessening competition in the *Criminal Code*.⁶¹ Secondly, the doctrine of free competition also clearly recognized that only those agreements which lessened competition *unduly* were illegal.

The doctrine of free competition was accepted in the *Firestone Rubber* case⁶² where Schroeder, J. described section 498 of the *Criminal Code* as "a law enacted to protect the public interest in free competition". A slight variant of the doctrine was found in another rubber case. In *Goodyear Tire and Rubber*,⁶³ Roach, J.A. cited with approval the words of Duff, J. in the constitutional test of section 498 (the basic conspiracy provisions) and the Act.⁶⁴ "The legislation [s. 498 of the *Criminal Code*] aims at suppressing certain practices calculated, in the view of Parliament, to limit competition and produce the evil of high prices." This decision was affirmed by the Privy Council.⁶⁵

In the *Wire Fencing* case, Judson, J. cited the words of Chief Justice Duff and Kervin, J. in *Container Materials* in reiterating the maintenance of free competition as the primary objective of the legislation.⁶⁶ In the *Northern Electric* case,⁶⁷ McRuer, C.J.H.C. restated and agreed with the rule laid down in *Weidman v. Shragge, Stinson-Reeb* and *Container Materials*. But he reminds us that it is only *undue* restraints upon free competition that are tainted with illegality, that is, only if an agreement imposes "improper, inordinate, excessive or oppressive restrictions upon the free competition, the benefit of which Parliament has sought to preserve to the public, [should] the accused be found guilty." The four adjectives are, of course, those which originated with Osler, J.A. in *R. v. Elliott*.⁶⁸

Fifteen years elapsed between *Container Materials* and the next Supreme Court test of the competition legislation in the *Howard Smith* case in 1957. The trial judge, Spence, J., reiterated the doctrine of free competition by references to *Elliott, Weidman v. Shragge* (Idington, J.), *R. v. Alexander* and to Kerwin, J. in *Container Materials*.⁶⁹

The Supreme Court of Canada again reinforced the rule. Mr.

Justice Taschereau stated: "The public is entitled to the benefit of free competition, and prohibitions of the act cannot be evaded by good motives."⁷⁰ He went on to state that the undue restraint section 498 is aimed at is "the elimination of the free domestic markets." Then he cited *Stinson-Reeb* and Duff, C.J.C. in *Container Materials*, who said, "The enactment before us, I have no doubt, was passed for the protection of the specific *public interest* in free competition."⁷¹ Duff, C.J.C. then went on to say, "the enactment is aimed at protecting the public interest in free competition, it is *from that point of view* that the question must be considered whether or not the prevention or lessening agreed upon will be undue . . ."⁷² Mr. Justice Kellock (with Rand, J. concurring) also cited this passage and also cited Anglin, J. in *Weidman v. Shragge* and the often-quoted passage from *Stinson-Reeb*.⁷³

Yet additional confirmation of the doctrine of free competition can be found in almost all subsequent cases until the latest Supreme Court of Canada decisions in 1977, 1980 and 1982, which made virtually no reference to it.⁷⁴ In *R. v. D.E. Adams Coal Ltd. et al.*, the trial court held that the public has "the right to free, competitive tenders".⁷⁵ In *Canadian Breweries*,⁷⁶ a merger case, McRuer, C.J.H.C. stated that one of the principles of the law relating to conspiracies as enunciated in the five leading Supreme Court of Canada cases to that time⁷⁷ is that "the enactment is for the protection of the specific public interest in free competition . . .". In *B.C. Sugar*, Williams, C.J.Q.B. followed very closely the words of Mr. Justice McRuer in *Canadian Breweries* when he said, "the public is as a matter of public policy, entitled to the benefit of free competition (except as it be interfered with by valid legislation). . . ."⁷⁸

The doctrine of free competition was enunciated in quite a number of other cases as well.⁷⁹ In *R. v. Canadian General Electric et al.*, for example, a case involving both conspiracy and monopoly, Pennell, J. said:

... the basic parliamentary policy, as revealed in the *Combines Investigation Act*, has always been that a full competitive market shall serve as the principal regulator of economic activity . . .

The legislative purpose of Section 32(1)(c) of the Act relates to lessening of competition unduly, and is to protect the public interest in 'free competition' as judicially understood.⁸⁰

Perhaps because the doctrine had become so ingrained⁸¹ in the jurisprudence, Mr. Justice Pennell felt no need to provide citations to earlier leading cases.

The Supreme Court: The Latest Cases

Since 1976 there have been four important competition-policy cases⁸² decided by the Supreme Court of Canada. In the *K.C. Irving* case,⁸³ which dealt with charges of both monopoly and merger, the doctrine of free competition was not raised by the unanimous Court in determining whether or not the Irving enterprises had operated all five English-language daily newspapers in New Brunswick to the detriment or against the interest of the public. Because the Crown failed to establish instances of specific public detriment, the Supreme Court affirmed the Court of Appeal's decision and acquitted the companies on all counts.⁸⁴

In the *Aetna Insurance* case,⁸⁵ for the majority, the discussion of the doctrine of free competition emerged only in the context of the meaning of the word 'unduly'.⁸⁶ All the usual authorities were cited as to the meaning of 'unduly', but the decision of the majority hinged on the question of whether the Crown was required to prove *intent* to lessen competition unduly and on the admissibility of certain evidence as to alleged benefits to the public stemming from the agreement among the seventy-two Nova Scotia fire-insurance companies.

In the *Atlantic Sugar* case,⁸⁷ a six-to-one majority of the Court reversed the decision of the Quebec Court of Appeal and thereby acquitted the three largest sugar refiners in eastern Canada of charges of price fixing and market sharing. The majority's opinion, written by Pigeon J., contains absolutely no discussion of the purposes of the Act. In contrast, Mr. Justice Estey in his dissent, "in considering the purpose behind the *Combines Investigation Act*," cites the classic statement of Chief Justice Duff in the *Container Materials* case that we cited above, that is, "The enactment before us, I have no doubt, was passed for the protection of the specific public interest in free competition . . ."

The case was decided on the following points:

- The arrangement entered into by the accused was a 'tacit agreement' and as such is not subject to the provisions of section 32 of the *Combines Investigation Act*.
- The Crown had not established that the accused had made an agreement with the *intention* of lessening competition unduly.⁸⁸

The effect of the judgments in the *Aetna* and *Atlantic Sugar* cases is to make it much more difficult for the Crown to obtain a conviction under section 32.⁸⁹ Among the reasons is the apparent willingness of the court now to accept evidence of public benefits said to flow from the agreement in question in determining the *object* of the alleged agreement.⁹⁰ This appears to constitute a reversal of the

Supreme Court's position enunciated by Taschereau J. in the *Howard Smith* case in 1957:

The public is entitled to the benefit of free competition, and the prohibitions of the act cannot be evaded by good motives. Whether they be innocent and even commendable, they cannot alter the true character of the combine which the law forbids, and the wish to accomplish desirable purposes constitutes no defence and will not condone the undue restraint, which is the elimination of the free domestic markets. . . .⁹¹

It is my strong view that traders, manufacturers and producers cannot monopolize a substantial part of the market in a given industry, to promote their own business interests, and then set themselves up as public benefactors, by saying to the courts that the conspiracy was organized in order to achieve the stabilization of prices and production.⁹²

Perhaps more disturbing about the *Aetna* decision on this point is the fact that the majority of the Supreme Court of Canada did not weigh the alleged benefits against the adverse effects produced by the agreement. It appears that evidence of almost any type and amount of public benefits may establish that the accused's *object* in entering the agreement was not to lessen competition unduly. For these and other reasons, the Minister of Consumer and Corporate Affairs proposes to amend section 32 of the Act.⁹³

The most recent competition-policy case decided by the Supreme Court of Canada was *Jabour v. Law Society of British Columbia et al.*⁹⁴ It dealt with the relationship between competition policy and provincial regulation. In general terms, the Supreme Court of Canada held that the governing body of a self-governing profession, functioning under a constitutionally valid provincial statute, is not subject to the criminal provisions of the federal *Combines Investigation Act*. As a matter of statutory interpretation, the Act did not apply to the action of the Benchers (the governing body) in disciplining *Jabour* for 'conduct unbecoming' a member of the Law Society by reason of advertising his services. The actions of the Benchers were held to be different in character both in fact and in law from the type of criminal conspiracies envisaged in section 32(1) of the Act. The effect of the decision may be to exempt a wide range of regulated conduct from the purview of Canada's competition law (Stanbury 1984). The Supreme Court did not discuss the objectives of the Act with the exception of a cryptic statement that criminal offences

under the *Combines Investigation Act* require the Crown to prove conduct "contrary to the public interest".⁹⁵

Effective Doctrine or Empty Rhetoric?

To anyone familiar with the large number of government-sponsored or government-tolerated restrictions on competition,⁹⁶ the often apparently-unabashed judicial embrace of the doctrine of 'free competition' in its unqualified form must come as something of a surprise. As stated at the outset, the decisions of the Canadian courts, as opposed to the rhetoric of free competition, require that price-fixing conspiracies lessen competition *unduly*, and that mergers and monopolies behave so as to permit the Crown to establish beyond a reasonable doubt that they have operated to the specific detriment of the public interest in rather express terms.

In its simplest form, the doctrine of free competition is taken to hold that the intent of Parliament in establishing competition legislation was to strike down all, or substantially all, impediments to the operation of competitive markets. While a number of judgments (as we have seen) have expressed the doctrine of free competition in its operational, highly qualified form, in no judgment has its fundamental principle been challenged until 1976.

In *Kito* Mr. Justice O'Sullivan, unlike Arnup, J.A. in *Browning Arms*,⁹⁷ another resale price-maintenance case, specifically *rejected* the maintenance of free competition as the primary objective of section 38 of the Act. In his view, the section "effects a restraint on free competition."⁹⁸ He noted that Justices Brandeis and Holmes, proponents of free competition, were opposed to legislation prohibiting resale price maintenance. (They did so because they also interpreted the U.S. antitrust laws as designed to protect small business, and not because they favoured the restraints inherent in resale price maintenance.)⁹⁹

Mr. Justice O'Sullivan then offered his well-articulated criticism of the doctrine of free competition:

With respect to those who hold the contrary view, I think that the *Combines Investigation Act*, even considered as a whole, is not designed to protect a system of free competition, but rather to restrict "undue" interference with competition. Furthermore, I do not think that it is incorrect to say that Parliament has indicated any general intention to uphold a system of free competition in this country. In my opinion, it is doubtful if it is

right to say that Parliament has enacted any law which has as its underlying premise the proposition that "free competition is the stuff of our economic way of life in a democratic society."

Parliament itself has restricted competition in a great variety of ways. We have only to think of marketing legislation for natural products, legislation in respect of the Wheat Board, legislation in respect of transportation, even legislation in respect of advertising in magazines, to recognize that Parliament generally believes that free competition is not the "stuff" of our economic way of life in a democratic society.

The fact is that we live in a mixed economy and have done so since before Confederation. At all levels of Government, free competition has been interfered with whenever and as often as legislators have thought that the common good required restriction.

In my opinion, therefore, it is not helpful in applying s. 38 to begin with a bias in favour of free competition.

The Court itself should have no such bias and, in my opinion, it should not attribute such a bias to Parliament.

The Courts do have a bias in favour of the liberty of the subject and in favour of the common law and its principles. The Courts presume that legislative bodies do not intend to change the common law or to interfere with the freedom of the citizen unless apt words are used to express such an intention.

Freedom of contract is one of the principles which the common law has traditionally upheld, subject to public policy and the need to ensure that contracting parties are operating on an equal footing. Capitalism and the free market have, however, never been enshrined in the common law. From the earliest times down to the present day of wage, price and rent controls, the law has shown a determination to prevent capitalism and free competition from injuring the public good as conceived by Parliaments and Legislatures.¹⁰⁰

This passage is interesting because it is *unique*. While it appears to repudiate the doctrine of free competition quite successfully, it is less impressive upon closer analysis. The upholders of the doctrine of free competition at no time read 'unduly' out of the conspiracy section of the law as Mr. Justice O'Sullivan implies in his first point. This should be apparent from our previous review of the cases. The doctrine of free competition, as most of its adherents made clear, generally referred to the conspiracy provisions. It was later, by

analogy, extended to the few merger and monopoly cases and to predatory pricing in the *Hoffman-LaRoche* case in 1980.¹⁰¹

The support for the doctrine is wider than O'Sullivan, J. implies. The Royal Commission on Corporate Concentration (Canada, 1978, pp. 69-70) summarized the role of the markets and, by implication, free competition, in the following words:

On the whole, although numerous constraints are placed on its operation, in Canada we continue to rely primarily on the market mechanism (also called the price system or price mechanism) to allocate resources, adjust production and consumption, distribute income and bring about economic growth. The allocation of resources through the market mechanism does not imply that firms are privately or publicly owned, nor does it say anything about the degree of competition among those enterprises. It implies only that economic units are largely autonomous with regard to the decisions they make and that they deal with one another chiefly through voluntary exchanges of goods and services.

Much more specific support for the doctrine of free competition can be found in two cases under those sections of the *Patent Act* concerning compulsory licensing (Gorecki, 1981b). Speaking for the Supreme Court of Canada, Abbott, J. stated:

In my view, the purpose of section 41(3) [of the *Patent Act*] is clear. Shortly stated it is this. No absolute monopoly can be obtained in a process for the production of food or medicine. On the contrary, Parliament intended that, in the public interest, there should be competition in the production and marketing of such products produced by a patented process, in order that as the section states, they may be "available to the public at the lowest possible price consistent with giving to the inventor due reward for the research leading to the invention."¹⁰²

This agreed with a similar statement made by Jackett, J., of the Federal Court of Canada, in the same case:

In my view, the objective of the provision is to bring about competition. On balance, in most fields, competition is regarded by Parliament as being in the public interest. . . and also because competition tends to bring about greater efficiency, better service, and further research. The monopoly granted to

an inventor is an exception to this general principle in our law. Section 41(3) was passed because, in the field to which it applies, "the specific public interest in free competition" was deemed to be more important than the maintenance of the patentee's monopoly rights. . . .¹⁰³

It is not inconsistent, as Mr. Justice O'Sullivan implies in his third paragraph, for Parliament to intend that free competition be protected by statute in those areas of economic activity which are *not* subject to direct regulation. Parliament correctly recognized that there are two broad forms of social control of economic behaviour: the forces of competition that ought not to be restricted unduly by *privately* imposed restraints on trade; and active regulation by a public body pursuant to a Parliamentary mandate.¹⁰⁴ The latter technique is invoked when the outcomes produced by the competitive process are deemed unsatisfactory for a wide range of reasons, from what economists call 'market failures' to the desire to alter the market-determined distribution of income. (Economic Council, 1979, pp. 49-52.) Studies done for the Council estimated that in 1978 about 29 per cent of Gross Domestic Product at factor cost was subject to federal or provincial regulation in respect to price, entry, or output. (Stanbury and Thompson, 1980.)

Regarding Parliament's intention in enacting the provisions concerning resale price maintenance in 1951, Mr. Justice O'Sullivan might have come to a different conclusion had he examined closely the Report of the MacQuarrie Committee (Canada, 1952), the proceedings of the Parliamentary Committee that examined the proposed price-maintenance/refusal-to-deal legislation and the Debates of Parliament itself.¹⁰⁵ These sources reveal a concern with the effect of the price maintenance on the level and rate of increase of prices; the ability of manufacturers and distributors to coerce retailers into competing on bases other than price; and a concern for protecting the interests of small businessmen, even to the extent, in some cases, of adversely affecting the process of competition. (Rosenbluth and Thorburn, 1963, Ch. 3 and 4.)

Therefore, persuasive as it appears, Mr. Justice O'Sullivan's critique of the doctrine of free competition is mistaken and misdirected.¹⁰⁶ The doctrine may have receded from the view of the courts in major combines cases, but it was still evoked by the Minister of Consumer and Corporate Affairs in 1980:

The Combines Investigation Act reflects a choice, that of decentralized decision-making by the private sector as a means of

distributing the economic resources of the country. . . . Free competition over a long period of time ensures that retail prices for goods and services will be lower, that the consumer will have a better choice. This free competition will further ensure a spirit of corporate initiative as well as efficient allocation of resources within the Canadian economy. It is these advantages of competition that are undermined by the concentration of economic power. (Ouellet, 1980, p.6.)

Mr. Justice O'Sullivan's analysis is unlikely to be influential because the doctrine, until recently, has been ingrained in every Supreme Court of Canada decision but one that has addressed the matter. We may have, however, witnessed the triumph of form, that is, the mere statement of the 'code words', free competition, over reality, which is much more complex. Even where they use the words 'free competition', the courts may have lost sight of their meaning as enunciated by their brethren many decades earlier. Hence the doctrine of free competition may have become irrelevant. As the *Aetna Insurance* (1977), *Atlantic Sugar* (1980) and *Jabour* (1982) decisions of the Supreme Court of Canada indicate, the majority of Canada's court of last resort appears to have lost sight of the substantive meaning of the public's interest in curbing restraints of trade. The majority has totally ignored even the rhetoric of free competition, although the few dissenters have maintained the tradition. The majority might well reread the analysis of Mr. Justice Idington in *Weidman v. Shragge*, written some seventy years ago.

Notes

1. In light of the Supreme Court of Canada's decisions in the *Aetna Insurance* (1977) 34 C.C.C. (2d) 157 and *Atlantic Sugar* (1980) 16 C.R. (3d) 128 cases, some modification may be required. See the discussion below.
2. See Stanbury (1981a); Gorecki and Stanbury (1981a); and Baggeley (1982).
3. Between 1889 and 1910, the legislation focused exclusively on horizontal restraints of trade, i.e., combines. In 1910 the definition of a combine was broadened to include a merger or monopoly, although these terms were not specifically defined until 1960. In 1935 a provision against price discrimination and predatory pricing was introduced. Other new provisions followed: see Table 1-1.
4. (1905) 9 C.C.C. 505 at p. 520; emphasis in the original.

5. *Ibid.*, p. 9.
6. (1910) 20 M.R. 188 at p. 206.
7. *Weidman v. Shragge* (1912) 46 S.C.R. 1 at p. 4.
8. *Ibid.*, pp. 4-5.
9. *Ibid.*, p. 6.
10. *Ibid.*, pp. 36-37.
11. *Ibid.*, pp. 42-43. Note: the *Elliott* case (1905) 9 C.C.C. 505 at p. 520 was footnoted.
12. The relevant passage is quoted in Chapter 2, note 13.
13. (1929) S.C.R. 276 at p. 280.
14. (1932) 57 C.C.C. 346 at p. 361.
15. (1934) 59 C.C.C. 114 at p. 153.
16. (1935) 3 D.L.R. 330 at pp. 336, 337, 340, 355.
17. Unreported judgment, Quebec Court of Appeal, June 2, 1935 (Ottawa: Bureau of Competition Policy, mimeo 24-2) at p. 3.
18. *R. v. Imperial Tobacco Co. et al.* Unreported judgment, Alberta Supreme Court, July 26, 1941 (Ottawa: Bureau of Competition Policy, mimeo 26-3).
19. The case of *MacEvan v. Toronto General Trusts* (1917) 54 S.C.R. 381, did not address the issue.
20. *R. v. Container Materials Ltd. et al.* (1940) 74 C.C.C. 113 at pp. 121, 122, 123.
21. (1941) 3 D.L.R. 145 at pp. 167-68 and p. 180 respectively.
22. (1942) 77 C.C.C. 129 at p. 134.
23. *Ibid.*, p. 141.
24. *R. v. Canadian Coat and Apron Supply Limited et al.* (1967) 52 C.P.R. 189.
25. See, for example, *R. v. Clarke* (1907) 14 C.C.C. 46 (trial); 14 C.C.C. 57 (appeal).
26. This statement from the Director's *Annual Report* for the year ended 31 March 1964 (p. 7) was repeated every year to the end of 1972/73. See the discussion in Chapter 4.
27. (1910) 15 C.C.C. 408 at p. 442.
28. *R. v. Beckett et al.* (1910) 15 C.C.C. 408 at p. 421.
29. (1912) 46 S.C.R. 1 at pp. 27-28.
30. (1932) 57 C.C.C. 346 at pp. 360-61.
31. *Ibid.*, p. 361.
32. Canadian legislation was enshrined in the criminal law for constitutional reasons. See McDonald (1969). The constitutionality of the civil provisions introduced in 1976 is debated in Grange (1975) and Hogg and Grover (1976). In the United States, under the *Sherman Act*

of 1890, the federal government may proceed by criminal indictment or by civil complaint. See Thorelli (1955).

33. (1912) 46 S.C.R. 1 at p. 20.
34. Contrast this position with that of the U.S. Supreme Court re s. 1 of the *Sherman Act* in *Trans-Missouri Freight* (1897) 166 U.S. 290; *Addyston Pipe* (1899) 175 U.S. 211; *Trenton Potteries* (1927) 237 U.S. 392; *Socony-Vacuum* (1940) 310 U.S. 150. See the discussion in Bork (1978).
35. (1912) 46 S.C.R. 1 at p. 20.
36. *Ibid.*, p. 21. Over six decades later, the Royal Commission on Corporate Concentration (Canada, 1978, pp. 2-3) recognized the role of government in placing curbs (and bestowing advantages) on the activities of private firms. Herschel Hardin (1974) has called Canada a "monopoly culture". On the scope of government intervention in the Canadian economy, see Howard and Stanbury (1983).
37. (1912) 46 S.C.R. 1 at pp. 22-23.
38. *Ibid.*, p. 24.
39. This broad construction was restated a few pages later by Idington, J. when he said:

The Act not only destroys a former right of combination, but also renders illegal every direct or indirect device contrived by the art of men to serve those agreeing in the purpose of acquiring the market for themselves and adopted by them to execute such purpose and thus also destroys the devices they may have incidentally adopted to promote the main purpose. All that is, directly or indirectly, knowingly used to promote any criminal purpose must be held void. (1912) 46 S.C.R. 1 at p. 29.

40. (1912) 46 S.C.R. 1 at pp. 24-25.
41. *Ibid.*, p. 32. This emphasis on leaving rivals free to compete can also be found in contemporaneous decisions of the U.S. Supreme Court. For example, in the *Corn Products Refining* case, the Court said:

Persons actuated with a desire to monopolize the whole of an industry will try — indeed, are already trying — to keep out others, regardless of whether those others can compete efficiently or not. Their conduct constitutes a social evil, because the public is entitled to the free play of such industrial power and capacity as such outsiders may be able to develop. (1916) 234 *Fed. Rep.* 964 at p. 1013.

42. (1912) 46 S.C.R. 1 at p. 25.
43. Fred A. McGregor (1946a, p. 13), who administered the legislation between 1925 and 1949, defined "genuine freedom of trade" as follows: "freedom of entry, freedom to seek and expand markets anywhere, freedom to sell freely, freedom to reduce prices, freedom to

experiment, initiate and take risks; and also freedom of consumers to choose among competing dealers, competing products and competing prices."

44. (1941) 3 D.L.R. 145 at pp. 167-68.
45. (1951) 101 C.C.C. 22 at p. 38.
46. *Ibid.*
47. *R. v. Northern Electric Company Limited et al.* (1955) O.R. 1431 at pp. 443-44.
48. *R. v. Dominion Steel and Coal Corp. et al.*, unreported judgment, Supreme Court of Ontario, 27 April 1956 (Ottawa: Bureau of Competition Policy, mimeo 45-1) at p. 11.
49. *R. v. British Columbia Sugar Refining Company Limited et al.* (1960) 32 W.W.R. 557 at p. 635.
50. See note 24 above, also reported in (1967) 3 C.R.N.S. 62 at pp. 68-69.
51. *Ibid.*, p. 77.
52. *Ibid.*, pp. 79-80.
53. We note that in one of the latest predatory pricing cases, *R. v. Hoffman-LaRoche*, Linden, J. stated: "Although [predatory pricing]... may make good business sense in certain circumstances, Parliament has decided to forbid these practices because the public interest demands a system in which fair competition thrives." (1980) 28 O.R. (2d) 164 at pp. 192-93. He then quoted Chief Justice Fitzpatrick in *Weidman v. Shragge* as follows:

An agreement which might in itself be perfectly lawful as made by the parties in the exercise of the freedom to contract or to abstain from contracting, which the English law has for many years recognized in every individual, is unlawful if the object of the parties is to unduly prevent or lessen competition. . . . It is not necessary . . . that the agreement should be in itself fraudulent or otherwise illegal. . . . The mischief aimed at is the undue and abusive lessening of competition which operates to the oppression of individuals or is injurious to the public generally.

Linden, J. went on to say that "the same philosophy underlies the entire Act to foster fair competition in the market-place to the benefit of Canadian consumers and to prevent agreements or activities that interfered with that fair competition, even though these agreements or activities may make sound business sense to those involved in them." (1980) 28 O.R. (2d) 164 at p. 193. Upon appeal, the decision of Linden J. was upheld on all points. (1982) 62 C.C.C. (2d) 118; 58 C.P.R. (2d) 1.

54. On 3 September 1939, the Wartime Prices and Trade Board was established. See Magwood (1981). Fred A. McGregor, who had been the Commissioner of the *Combines Investigation Act*, became a member

- of the Board. The Maximum Prices Regulations came into effect 1 December 1941. McGregor became Enforcement Administrator of the Board. The price ceilings were suspended in January 1947.
55. (1951) 101 C.C.C. 22 at pp. 29–30; emphasis in the original.
 56. *Ibid.*, p. 31.
 57. (1951) 104 C.C.C. 39 at pp. 51–53.
 58. (1953) 109 C.C.C. 1 at p. 20.
 59. This point was strongly emphasized by the Supreme Court of Canada in the *K.C. Irving* case, the first merger/monopoly case to be heard by that court. See *R. v. K.C. Irving Ltd. et al.* (1977) 32 C.C.C. (2d) 1; 29 C.P.R. (2d) 83 and the comments by Reschenthaler and Stanbury (1977) and Cairns (1981a).
 60. (1953) 109 C.C.C. 1 at pp. 20–21.
 61. See *R. v. Clarke* (1907) 14 C.C.C. 46 (trial), 1 Aeta L.R. 358 at p. 368; *Weidman v. Shragge* (1912) 46 S.C.R. 1 at p. 25; *R. v. Alexander et al.* (1932) 2 D.L.R. 109, 57 C.C.C. 346; *R. v. Canadian Import* (1935) 62 C.C.C. 342, 3 D.L.R. 330; *R. v. Canadian Breweries* (1960) O.R. 601, 33 C.R. 1; *R. v. Eddy Match* (1954) 109 C.C.C. 1, 20 C.P.R. 107 (C.A.)
 62. (1953) 20 C.P.R. (2d) 8 at p. 15.
 63. (1954) 4 D.L.R. 61 at p. 65.
 64. *Re Combines Investigation Act and s. 498 of the Criminal Code* (1929) 2 D.L.R. 802 at p. 805.
 65. *Proprietary Articles Trade Association v. The Attorney General for Canada* (1931) A.C. 310; 55 C.C.C. 241.
 66. *R. v. Dominion Steel and Coal Corp. Ltd. et al.*, unreported judgment, Supreme Court of Ontario, April 27, 1956 (Ottawa: Bureau of Competition Policy, mimeo 45-1) at pp. 9–10.
 67. (1955) O.R. 431 at pp. 435–36.
 68. (1905) 9 C.C.C. 505 at p. 520.
 69. *R. v. Howard Smith Paper Mills Limited et al.* (1954) 109 C.C.C. 65 at pp. 86–88.
 70. (1957) 118 C.C.C. 321 at p. 324.
 71. (1942) 1 D.L.R. 529 at p. 533; emphasis in the original.
 72. (1957) 118 C.C.C. 321 at p. 325; emphasis in the original.
 73. (1957) 118 C.C.C. 321 at pp. 326–28.
 74. *R. v. Aetna Insurance et al.* (1977) 34 C.C.C. (2d) 157; *R. v. Atlantic Sugar et al.* (1980) 54 C.C.C. (2d) 373; *Jabour v. Law Society of B.C. et al.* (1982) 5 W.W.R. 289.
 75. Unreported judgment, Williams, C.J.Q.B., 12 November 1957 (Ottawa: Bureau of Competition Policy, mimeo 48-1) at p. 7.
 76. (1960) O.R. 601 at p. 604.

77. The case of *MacEwan v. Toronto General Trusts* (1917) 54 S.C.R. 381 is usually ignored by those writing about combines cases.
78. (1960) 32 W.W.R. 577 at p. 584.
79. The list includes: *R. v. Abitibi* . . . (1961) 131 C.C.C. 201 at pp. 250-51; *R. v. Electrical Contractors* . . . (1961) 37 C.P.R. 23 at pp. 32-34; *R. v. Ryan Builders Supplies*, unreported judgment, Supreme Court of Ontario, 16 September 1966 (Ottawa: Bureau of Competition Policy, mimeo 84-1 at p. 1); *R. v. J.M. Mills et al.* (1968) 56 C.P.R. 1 at p. 32; *R. v. B.C. Professional Pharmacists' Society* (1970) 64 C.P.R. 129 at p. 148; *R. v. Alpa Industries*, unreported judgment, Supreme Court of Ontario, 26 June 1974 (Ottawa: Bureau of Competition Policy, mimeo 237-1 at p.2); *R. v. Armco Canada Ltd. et al.* (1974) 21 C.C.C. (2d) 129 at p. 185; *R. v. Anthes Business Forms et al.* (1974) 16 C.P.R. (2d) 216 at p. 221; *R. v. Allied Chemical and Cominco Ltd.* (1975) 24 C.P.R. (2d) 221 at pp. 227-28; and *R. v. Aluminum Co. of Canada Ltd. et al.* (1976) 29 C.P.R. (2d) 183 at p. 192.
80. (1976) 29 C.P.R. (2d) 1 at p. 12.
81. One point of a more general nature concerns the remarkable consistency of the Canadian judiciary in the interpretation of the doctrine of "free competition" over the period from 1889 to the mid-1970s. In the 1930s, for example, the attempt to allow conspiracies to alleviate the effects of the Depression was struck down as being unconstitutional in Canada (see McConnell, 1971), but not in the United States. However, in the United States, Robert Solo (1974) argues that such consistency does not seem to be the rule, for it is only with reference to existing ideology that apparent inconsistencies can be understood. Are we to assume that the existing ideology has not changed in Canada or that the Canadian judges are much less inflexible? Or has Solo mistaken a few aberrant cases for major swings in interpretation? Perhaps our comments on Mr. Justice O'Sullivan's judgment in *R. v. Kito Canada Ltd.*, discussed below, are incorrect. The judgment reflects the recognition of the growing importance of the state in the twentieth as compared with the late nineteenth century. In other words, the inconsistency can be explained using Solo's model, but not by a straightforward reading of judgments based on the criteria of precedent.
82. This list omits *R. v. Chatwin Motors Ltd.* (1980) 2 S.C.R. 64 as it was not of the same significance as the other four to be discussed.
83. (1977) 32 C.C.C. (2d) 1; 72 D.L.R. (3d) 82.
84. See Roberts (1977); Reschenthaler and Stanbury (1977); and Cairns (1981b, 1981c).
85. (1977) 34 C.C.C. (2d) 157; 30 C.P.R. (2d) 193. See *Annual Report of the Director of Investigation and Research* . . . for the year ended 31 March 1978 (Ottawa: Minister of Supply and Services Canada, 1978), pp. 16-19; Cairns (1981b); and Reschenthaler and Stanbury (1981).

86. Nevertheless, in his dissent, Laskin, C.J. (Judson, Spence, J.J., concurring) did state:

If there is any dominant theme reflected in the case law on illegal conspiracies under the present *Combines Investigation Act* and under predecessor legislation, it is that of the public interest in competition, which the statute is designed to protect as being the ultimate good in a market economy and not to be diluted by any showing that the impugned combination has brought benefits to the public, either in price or in services or otherwise. (1977) 34 C.C.C. (2d) 157 at p. 161.

87. (1980) 2 S.C.R. 664; 54 C.C.C. (2d) 373; 53 C.P.R. (2d) 1.
88. See the discussion in Reschenthaler and Stanbury (1981); McFetridge and Wong (1981, 1982); Englehart (1981); and Cairns (1981b).
89. But see Business Council on National Issues (1981b). We note that both *Aetna* and *Atlantic* were not subject to s.32(1.1), which came into effect on 1 January 1976. It provides:

For greater certainty, in establishing that a conspiracy, combination, agreement or arrangement is in violation of subsection (1), it shall not be necessary to prove that the conspiracy, combination, agreement or arrangement, if carried into effect, would or would be likely to eliminate, completely or virtually, competition in the market to which it relates or that it was the object of any or all of the parties thereto to eliminate, completely or virtually, competition in that market.

It is possible, if unlikely, that had this provision been in effect, the Court's decision would have been different.

90. See *Aetna Insurance* (1977) 34 C.C.C. (2d) 157 at p. 172 and the discussion in Reschenthaler and Stanbury (1981).
91. (1957) 118 C.C.C. 321 at p. 324.
92. *Ibid.*, p. 324. In the same case, Kellock J. stated, "The statute proceeds upon the footing that the preventing or lessening of competition is itself an injury to the public. It is not concerned with public injury or public benefit from any other standpoint." (1957) 118 C.C.C. 321 at p. 329. Also, in the same case, Cartwright J. quotes and affirms Roach, J.A.'s conclusion in the Court of Appeal: "...in considering the evidence adduced I am not free to find that the lessening intended was not undue on the basis of any necessity of the industry, reasonableness of prices resulting or reasonableness of profits obtained." (1957) 118 C.C.C. 321 at p. 342.
93. See Minister of Consumer and Corporate Affairs (Canada, 1981b) where he proposed that price-fixing and market-sharing agreements be made illegal *per se*. See the discussion in Stanbury and Reschenthal-

- er (1981). It now appears that the Minister will not introduce legislation incorporating the *per se* approach, but will try to address some of the new interpretations of the Supreme Court in conspiracy cases. See Linda McQuaig "Ottawa's Cautious Competition Bill", *Maclean's*, 18 July 1983, pp. 36-38; and *Globe and Mail*, 24 August 1983, p. B1.
94. (1982) 5 W.W.R. 289.
 95. *Ibid.*, p. 329.
 96. See, for example, the discussion of direct regulation in Economic Council of Canada (1981). It is estimated that in 1978 some 29 per cent of the Gross Domestic Product at factor cost is subject to price and/or output controls mandated by government regulation. (Economic Council of Canada, 1979, Table B2-4, p. 124.) See also the discussion in Block (1982).
 97. (1974) 18 C.C.C. (2d) 298; 15 C.P.R. (2d) 97.
 98. *R. v. Kito Canada Ltd.* (1976) 4 W.W.R. 189; 25 C.P.R. (2d) 145; 30 C.C.C. (2d) 521. We should point out that Mr. Justice O'Sullivan was speaking in the context of an appeal on sentence only. To some extent, therefore, his discussion of the doctrine of free competition may be considered to be *obiter dicta*.
 99. In general, see Pitofsky (1979); Schwartz (1979); Kauper (1980); and Elzinga (1977).
 100. (1976) 25 C.P.R. (2d) 145 at pp. 147-48.
 101. See note 53, above.
 102. *Hoffmann-La Roche Ltd. v. Bell-Craig Pharmaceuticals Division of L.D. Craig Ltd.*, (1967) 48 C.P.R. 137 at p. 144. This statement has been quoted with approval in subsequent cases. See, for example, *Merck and Co. Inc. v. S. & U. Chemicals Ltd.*, (1971) 65 C.P.R. 99 at p. 105.
 103. *Hoffmann-La Roche Ltd. v. L.D. Craig Ltd.*, (1966) 46 C.P.R. 32 at p. 50.
 104. See, for example s. 4.5 in Bills C-42 and C-13 proposed in 1977. The significance of this provision is discussed by several authors in Prichard, Stanbury and Wilson (1979, Part IV); see also Stanbury (1984).
 105. See Chapter 4. Mr. Justice O'Sullivan did make brief reference to the last source. See (1976) 25 C.P.R. (2d) 145 at p. 150.
 106. Skeoch (1966a, p. 5) would probably disagree and argue that Canadian governments evince little general support for competition as an economic (or social) process: "At the very least, however, it is clear that there is no Canadian public policy commitment to a general rule of competition. To assume that there is (or has been) is to misread the history of combines legislation and to simplify out of all relation to reality the vagaries of government policy and administration." Certainly, the long-term historical record is one of increasing government intervention on a number of fronts: taxes, expenditures, regulation, government ownership, 'tax expenditures', and loans and guarantees. (See Howard and Stanbury, 1983.) That does not deny, however, the

logic of maintaining free competition in that limited — and narrowing — component of the economy *not* subject to direct regulation or government ownership. (For a contrary view, see Block, 1982.)

4: *Economic Efficiency*

The idea that competition policy is a useful tool in improving economic efficiency is of fairly recent origin. In fact, this objective of competition policy was not given great weight, even in rhetorical terms, until the 1950s. As we have seen, the idea that competition legislation is designed to prevent the abuses attendant on the existence of economic power stemmed from 1889, when the first *Act for the Prevention of Suppression of Combinations formed in Restraint of Trade* was passed. Similarly, the doctrine of free competition originated in cases decided in the first decade of this century. In contrast, the emphasis on the idea that the objective of competition policy ought to be to achieve economic efficiency gained prominence in the late 1960s.

Definition

Economic efficiency is a broad concept. We use that term to refer to the economist's traditional concept of allocative efficiency in the production and distribution of goods and services, but also to refer to three somewhat related concepts: the maximization of the rate of growth of output per capita, the concept of dynamic efficiency, and also technical efficiency.

In highly simplified terms, allocative efficiency is achieved when it is not possible to rearrange outputs or to recombine inputs to make one person in the economy better off without reducing the economic welfare of another.¹ Economic theory can demonstrate that in the absence of externalities, public goods, decreasing costs over the

relevant range, and imperfect information, perfect competition in all markets will achieve allocative efficiency (Koopmans, 1957). Allocative efficiency, therefore, is closely linked to the idea of competitive markets.

Technical efficiency refers to the utilization of resources at the level of the firm. A technically efficient firm exploits economies of scale (both at the plant and the enterprise level) to operate on the lowest attainable cost curve, given the existing state of technology and the prices of inputs.² Over two hundred years ago, Adam Smith (1776, p. 147) recognized that "monopoly . . . is a great enemy to good management, which can never be universally established but in consequence of that free and universal competition which forces everybody to have recourse to it for the sake of self-defence."

Recently emphasis has begun to shift from the *static* concepts of allocative and technical efficiency (that is, the optimal output for society at a moment in time) to a greater concern for the *dynamic* elements of economic behaviour, that is, to questions of innovation, and technological change.³ Efficiency, therefore, has to be thought of as efficiency over time in a changing economy.

Over forty years ago, Lloyd Reynolds emphasized the overriding importance of efficiency as a main goal in competition policy.⁴ He noted that simply "fighting monopoly" is not enough.

The policy of fighting monopoly has been ineffective, not merely because it has never been thoroughly applied, but also because it was based on an inadequate analysis of the situation. We are faced, not simply with a monopoly problem, but with a much more complex and far-reaching problem of economic inefficiency. (Reynolds, 1940, p. 57.)

In the mid-1950s Professor V.W. Bladen also emphasized the efficiency objective of competition policy. He distinguished between the static and dynamic concepts of efficiency.

It is unfortunate that the interest in "competition" as a concept for static economic analysis, as the condition in which *existing* resources are most appropriately allocated, and as the guarantee that prices will be kept down to *existing* costs, has distracted attention from the dynamic view of the British political economists who were concerned with growth and development. The case for competition in the classical tradition was based on the belief that the maintenance of an atmosphere favourable to

innovation, enterprise, and technological advance was of paramount concern.⁵ (Bladen, 1956, p. 2. Emphasis in the original.)

Competition policy and its administration should seek to maintain an atmosphere "favourable to innovation". Bladen (*ibid.*) argued that "signs of placid acceptance of current technology, attempts to resist change, should, therefore, be considered among the most serious grounds for suspicion and remedial action."

Perhaps because he was also an economic historian, Bladen took a fairly long-term view of the competitive process. At the same time, he recognized that the conditions believed to foster innovation and technological change may also permit firms to exploit their market power:

The dilemma is this: we need long-run competitiveness to promote innovation and to ensure that the public enjoy the "cheapness and plenty" which can be the product of such innovation: yet we need some mitigation of competition in the short run if innovation and accumulation are to be induced under a system of free enterprise. It is the old dilemma of security and progress: too much security or too little security are alike unfavourable to progress, while many of the real bases of security depend on progress. (Bladen, 1956, p. 4.)

A.E. Safarian (1974, p. 58) has indicated that competition policy can serve a number of objectives, but:

A major objective has been the encouragement of more efficient use of economic resources, in both senses of the term efficiency. First, competition policy can act as a spur to efficient production, to innovation, and to encouraging the movement of economic resources into new and more rewarding patterns of use. Second, it can help to ensure that expanding production occurs in accordance with consumer demands.

While the economic efficiency objective of competition policy can be found in the 1950s, the most forthright espousal of it as the primary objective of competition policy did not occur until 1969, with the publication of the Economic Council's *Interim Report on Competition Policy*. In 1976 the Skeoch-McDonald report, prepared for the Department of Consumer and Corporate Affairs, emphasized dynamic efficiency. Then, in Bill C-13, introduced in November 1977, great emphasis was placed on *technical* efficiency, that is,

the ability of firms to achieve real economies of scale and produce at lowest unit costs. This theme was also evident in the Minister of Consumer and Corporate Affairs' (Canada, 1981b) proposals to amend the *Combines Investigation Act*.

Post-World War II and the 1950s

Perhaps the earliest statement that one of the objectives of competition-policy legislation is to maintain competitive conditions, including the dynamic elements to facilitate economic growth, can be found in Commissioner McGregor's *Annual Report* for 1944/45.

It has been increasingly emphasized, both by private enterprise and in plans for appropriate government policy, that the maintenance of a high level of domestic employment and income and the necessary expansion in exports will be conditioned in large part by the degree to which competition is active in leading to the development of new opportunities, the lowering of prices and the improvement in products. The maintenance of conditions which will permit competition to exercise its stimulating force is the basic principle underlying the legislation barring undue restraints on trade.

In the context of the report *Canada and International Cartels*⁶ and the 1946 commitment by the federal government to maintain full employment,⁷ Mr. Croll M.P., in the debate on the 1946 amendments to the *Combines Investigation Act*,⁸ stated:

We must pass an act or acts which will tear down the walls erected by these powerful combines between our factories, our farms, and our markets beyond the seas. We must curb restrictive actions which bar our exports, reduce our national income and cause unemployment in this country. We must maintain full production to meet the needs of our own people, and we must make better use of our natural resources.⁹ (CD, 2 July 1946, p. 3067.)

During debate on the 1949 amendments, George Drew, the Leader of the Opposition, saw the purpose of competition legislation as preventing a "very rigid type of economy". He emphasized the dynamic elements by saying that the Act prohibits "agreements between companies which have the effect of preventing improve-

ment in quality, improvement in usefulness, and reduction in prices by competition." (CD, 24 November 1949, p. 2158.) Mr. Drew emphasized that "a free economy and free enterprise" provide the "highest standard [of living] . . . in the world." He went on to say:

It is because we want to continue that system, to continue that competition and to continue the improvement of the living conditions which come from lowered prices, improved quality and improved usefulness, that we so strongly insist upon an effective act to prevent combines which would destroy competition and which are contrary to the interests of the people of Canada. (CD, 24 November 1949, p. 2158.)

In a series of speeches in the 1950s, Mr. Garson, the Minister of Justice, who was responsible for the *Combines Investigation Act*, reiterated and developed this theme. Speaking to the Retail Merchants Association, the Minister argued that the vast majority of North Americans "are convinced that the high standard of material comfort which [they] enjoy has resulted in no small measure from our system of private business enterprise." (Garson, 1950, p. 2.) The Minister asserted that "competition, puts a premium on efficiency and enterprise and is pretty ruthless toward the inefficient and unenterprising." (*Ibid.*, p. 3.) By protecting free enterprise itself, competition legislation assists in the achievement of the nation's ability to maximize national production, Mr. Garson argued. The following year, on CBC radio, in a speech dealing with the high cost of living and growing expenditures on defence, Mr. Garson (1951, p. 2) argued that "one way in which we can maintain the efficiency of our economy is by eliminating practices which prevent competition and thereby hold up prices." T.D. MacDonald, who was Director of Investigation and Research when Mr. Garson was Minister of Justice, saw the legislation in similar terms. For example, to the Business Newspaper Editors he said, in 1955, that the *Combines Investigation Act* was aimed at "the maintenance of conditions in which free enterprise can flourish and the nation's resources be fully used for the best advantage of all." (MacDonald, 1955b, p. 1.) To a trade association, a year later, Mr. MacDonald (1956, pp. 2-3) stated:

Generally speaking, the purpose of an anti-combines system in a free enterprise economy is to ensure the best utilization of all sources, physical, human or otherwise. The legislation seeks to achieve this purpose by controlling situations which do or are likely to enhance today's prices, resist innovations which will

lead to a lowering of tomorrow's costs and prices or otherwise prevent the resources of the country from being shifted into those fields where they may be expected to produce the best returns.

In 1956, in a speech to the University of Toronto Law Club, Mr. Garson (1956a, p. 2) asserted that "the chief objection to [arrangements which lessen competition over a substantial portion of a given market] is, briefly, that they tend to prevent our physical and human resources from being used in the most productive way to yield the highest possible standard of living."¹⁰ Later in 1956, in a speech to the Sloan Fellows at the Massachusetts Institute of Technology, Mr. Garson (1956b, pp. 1-2) argued that "... the purpose of the Canadian and the United States anti-trust or anti-combines systems is to ensure the most productive employment of all our resources and to maintain, at the highest possible level, opportunity for the individual to pursue the employment of his choice." Speaking to the Sloan Fellows a year later, Mr. Garson (1957, p. 3) restated this point, but added the phrase "the most rapid adoption of useful innovations in manufacture and distribution." The Minister of Justice seemed to anticipate the 'numbers versus efficiency' trade-off emphasized in the Stage II reforms in 1977 when he stated, "it is in the interest of a continuation of the free enterprise system that there remain as many centres of individual initiative as are compatible with the efficient utilization of resources." (Garson, 1957, p 4.)

Perhaps the longest and most coherent statement of Mr. Garson's views was made when, as Minister of Justice, he introduced the 1952 amendments to the *Combines Investigation Act*.¹¹ This extensive set of amendments followed the *Report of the Committee to Study Combines Legislation*, known as the MacQuarrie Committee report. What is interesting about this version of his views is that Mr. Garson emphasized that competition puts pressure on firms to innovate and to be efficient. The core of Mr. Garson's argument for competition legislation can be stated as follows:

- Because it provides the greatest material benefit (and political freedom), most Canadians support the free enterprise system.
- The forces of competition are those that drive the free enterprise system to produce a high standard of living.
- Because competition is "not automatically self-perpetuating", it is necessary to provide legislation to prevent undesirable restraints on competition.

- Failure to ensure the allocation of goods and services through competitive markets will result in either a system of private regulation or extensive state control.¹² (CD, 10 June 1952, pp. 3111-12.)

The efficiency benefits of maintaining competition were seen in the following terms:

The existence of arrangements relating to prices lessens the necessity to be on the lookout for a better machine or an improved process lest another find it first. Not only does a combine decrease that necessity; it may also enable the participants to defer the use of improvements already known but the utilization of which would involve the group in some immediate outlay for new capital equipment. By the same token the drive to seek economies of operation and administration is tempered. In the train of the principal arrangements upon prices come other restraints upon production and distribution.

... Competition produces not only better immediate prices but the development as time goes on of greater efficiency. It necessitates the improvement of existing processes and products and the introduction of new processes and new products. In a genuinely competitive market no manufacturer can rest upon his laurels. Continued success for him depends upon keeping in the vanguard of industrial advances. This benefits the whole society. (CD, 10 June 1952, p. 3112.)

This view, emphasizing the role of competition in encouraging the dynamic forces, presaged the influential Skeoch-McDonald report (1976) more than two decades later.

The 1960s

The Conservative government of John Diefenbaker introduced amendments in 1960 that, *inter alia*, brought the competition-policy provision in the *Criminal Code* into the *Combines Investigation Act*.¹³ Mr. Fulton, the Minister of Justice, spoke of the purposes of the legislation in terms very similar to those of his Liberal predecessor.

The basic principle is that a free enterprise system is the system which will yield the highest material standard of living in conjunction with the greatest possible degree of political, economic and social freedom for the individual and that this system of free enterprise will be best maintained through the operation

and preservation of active competition between the various sectors of the economy. It is our belief that in most sectors of society competition is still the best mechanism for allocating resources and distributing what those resources produce and for regulating relationships between men in the course of production and consumption. (CD, 30 May 1960, p. 4344.)

The purpose of the legislation, Mr. Fulton said, is "to maintain those competitive conditions which will make a free enterprise system work and work to the advantage of society and all segments of that society." (CD, 30 May 1960, p. 4344.) While much of the longer passage quoted above is couched in the rhetoric of 'maintaining the free enterprise system', in our view, the phrases "yield the highest material standard of living" and "best mechanism for allocating resources" make it safe to infer that a major objective of competition legislation is to achieve allocative efficiency and maximum output. The chain of logic might fairly be said to be the following:

- Competition legislation assists in maintaining conditions of effective competition.
- Effectively competitive markets allocate resources efficiently.
- Efficient allocation results in the highest material standard of living.

D.H.W. Henry was Director of Investigation and Research under the *Combines Investigation Act* between 1960 and 1973. He initiated in his *Annual Report* a series of concise statements as to the purpose of the Act. The first occurred in 1961/62, and it said in part:

The purpose of Canadian anti-combines legislation is to assist in maintaining free and open competition as a prime stimulus to the achievement of maximum production, distribution and employment in a system of free enterprise. To this end, the legislation seeks to eliminate certain practices in restraint of trade which serve to prevent the nation's economic resources from being most effectively used for the advantage of all citizens.¹⁴

Mr. Henry then went on to state that this idea had been authoritatively expressed by the Canadian judiciary as the protection of the public interest in free competition. (Recall the discussion in Chapter 3.) In his 1962/63 *Annual Report*, Mr. Henry reproduced the words quoted above, and then added a qualifying paragraph pointing out that in some areas of the economy, direct regulation (including agricultural marketing boards) by federal, provincial and

local governments had replaced competitive market processes.¹⁵ In his *Annual Report* for 1963/64, Mr. Henry made what was to become a classic statement on the objectives of competition policy. It was repeated in every annual report up to and including 1972/73.

The purpose of Canadian anti-combines legislation is to assist in maintaining free and open competition as a prime stimulus to the achievement of maximum production, distribution and employment in a system of free enterprise. To this end, the legislation seeks to eliminate certain practices in restraint of trade which serve to prevent the nation's economic resources from being most effectively used for the advantage of all citizens. Parliament's intention, as expressed in the legislation, has been to create an atmosphere in which those who are willing to compete for economic gain are free to do so. The statute does not require competitors to compete but merely seeks to remove certain classes of restraints on the process of competition. Parliament has therefore enacted legislation which will prohibit or discourage the regulation of industry by members of industry and which will encourage the regulation of industry by the forces of competition.¹⁶

The important modification or elaboration, of course, is contained in the third and fourth sentences. In a speech to a trade association in 1962, Mr. Henry was even more emphatic that the law did not require sellers to compete:

I should also like to make the observation that the legislation does not actually require businessmen to compete. The extent to which a particular entrepreneur will actively compete against others in the marketing of his product is a matter for him to decide. He cannot be forced to be a more vigorous competitor, a more efficient manager or a more progressive developer of his business. These matters are left to economic forces to bring about and so long as the businessman acts independently making his decisions as to the extent and vigour of his participation in an industry he does not fall within the prohibitions of the Act merely by reason that his approach to business life is a somewhat passive one or is inclined to follow the leader.¹⁷ (Henry, 1962, p. 1.)

As Milton Moore (1970, p. 107) has remarked, this conceptualization of the legislation "is negative in the sense of attempting to

prevent proscribed forms of behaviour rather than positive in the sense of seeking to induce the behaviour desired."

The Honourable Guy Favreau, President of the Privy Council, then the Minister responsible for the administration of the *Combines Investigation Act*,¹⁸ emphasized efficiency considerations in a speech in the House of Commons in 1966.

The Combines Investigation Act is based on the principle that under normal circumstances competition provides the greatest spur to efficiency and to the best allocation of economic resources in the private sector of the economy. This is sometimes forgotten in the more immediate concern about possible exploitation of consumers or about the inequitable treatment of some economic units by others. Where competition is effective, efficiency is rewarded and inefficiency is penalized. In the long run, efficient corporations grow and inefficient ones decline. Scarce resources are therefore channelled into the hands of those who use them best. (CD, 30 May 1966, p. 5688.)

Mr. Favreau went on to recognize the trade-off between economies of scale and concentration in Canadian industry.¹⁹ While opting for greater technical efficiency (in the form of economies of scale), he argued that tariff policy might be used to ensure that the benefits of increased efficiency, in part, would be transferred to the public. (CD, 30 May 1966, p. 5688.) This line of argument was to be incorporated into the ill-fated Bill C-256 in 1971. (Stanbury, 1977a, Ch.7.) An emphasis on technical efficiency, regardless of the ensuing increase in seller concentration and in the absence of benefits passed along to consumers, was to be embodied in Bills C-42 and C-13 in 1977. These bills will be discussed below.

The importance of efficiency as *the* goal of competition policy was stressed in the Economic Council of Canada's *Interim Report on Competition Policy* in 1969. This report was prepared by the Council in response to a special reference from the federal government in July 1966. Under the heading "Competition Policy and Economic Goals," the Council summarized its views as follows:

- the main objective of competition policy should be that of obtaining the most efficient possible performance from the economy;
- at any given moment, the economy should be using the resources available to it in ways that most contribute to raising total output in accordance with consumer demands;

- the efficiency of resource use must, however, be seen in dynamic as well as static terms, which implies among other things the recognition of the importance of research, invention and innovation;
- but the dynamic view also implies that as demands change and technology advances, resources should move freely into new and better patterns of use, and it is important therefore that monopoly and restrictive practices should not be allowed to get in the way of this process and prevent the economy from deploying its resources to better advantage in a changing world.

Essentially, we are advocating the adoption of a single objective for competition policy: the improvement of economic efficiency and the avoidance of economic waste, with a view to enhancing the well-being of Canadians. In conjunction with other policies, competition policy should seek to develop an economic environment in which beneficial change will be initiated and carried through, and in which real income will be maximized. (Economic Council of Canada, 1969, p. 19. Emphasis added.)

The Council (*ibid.*, p. 9) stressed that "*competition should not itself be the objective but rather the most important single means by which efficiency is achieved.*" (Emphasis in original.)

In reviewing the Council's position, it is important to recognize that it incorporated virtually all of the elements of our broad definition of economic efficiency: static allocative efficiency, dynamic efficiency (i.e., the optimization of innovation and technical change), and the maximization of real output for the benefit of consumers.

The Council recognized that competition policy may be used to serve other objectives, but considered that other policy instruments were more appropriate to achieve these goals:

This concentration of one objective is not meant to imply any necessary disparagement of other objectives, such as more equitable distribution of income and the diffusion of economic power, which have been entertained for competition policy in the past. It is simply that we believe:

- (1) that a competition policy concentrated on the efficiency objective is likely to be applied more consistently and effectively; and
- (2) that there exist more comprehensive and faster-working instruments, particularly the tax system and the structure of transfer payments, for accomplishing the deliberate re-

distribution of income and the diffusion of economic power, to whatever extent these are thought to be desirable. (Economic Council of Canada, 1969, pp. 19-20.)

In a study originally prepared for the Economic Council as an input to its study of Canadian competition policy, Professor Moore focused on the efficiency objective in terms of increasing productivity:

The general objective of a national competition policy is, of course, to increase income per capita by increasing productivity. The role of a competition policy is to force change and efficiency upon industries. . . . More specifically, the aim of the national competition policy should be to achieve greater productivity by a reduction of the avoidable wastes. . . . In the production of commodities, these economic wastes include some part of the high costs attributable to short runs of multiple lines and models and of plants too small to realize most of the economies of scale and some part of the costs of excessive reserve plant capacity. In distribution, the avoidable wastes include some part of the excessive expenditures on sales promotion and much of the costs of chronic excess capacity in many lines of retailing and in many service industries. (Moore, 1970, pp. 127-28.)

The 1970s

Two years after the Economic Council's *Report*, the federal government introduced Bill C-256, which incorporated a massive series of reforms for Canadian competition policy.²⁰ For the first time, a competition bill offered an extensive preamble outlining the objectives of the legislation:

1. Whereas competition in the private sector is ordinarily the best means of allocating resources, of enhancing efficiency in the production and distribution of goods and services and of transmitting the benefits of efficiency to the public, and competition also furthers individual enterprise by decentralizing economic power and reducing the need for government intervention in the achievement of economic objectives;
2. And Whereas it is therefore desirable to promote competition actively and also to remove, throughout Canada, obsta-

cles to competition whether created by combinations, mergers, monopolies or other situations or practices, and such objectives can only be achieved through the recognition, encouragement and enforcement of the role of competition as a matter of national policy;

3. And Whereas it is also recognized that in cases where a market is too small to support a sufficient number of independent firms of efficient size to promote effective competition, alternative means of promoting maximum efficiency may be required, but that where such an alternative means is adopted, it is necessary to ensure that the resultant benefits will be transmitted in substantial part and within a reasonable time to the public and that the public will be protected against any abuses that the alternative means of promoting efficiency may facilitate;
4. And Whereas it is necessary and desirable, in the interest of efficiency of production and distribution and the transmission of the benefits thereof to the public, to promote honest and fair dealing in the market . . . (Canada, 1971b, pp. 1-2.)

Unlike the Economic Council, the federal government saw its proposed *Competition Act* (which would replace the *Combines Investigation Act*) as being aimed at the achievement of a number of objectives, only *one* of which was efficiency in the allocation of resources. Nevertheless, there does not appear to have been any real conflict among the various objectives specified. As we shall describe, efficiency was the paramount objective.

The preamble to Bill C-256 indicated that the legislation was aimed at promoting competition by removing undesirable restraints of trade. The forces of competition, in turn, would achieve efficiency in the allocation of resources, distribute the benefits of efficiency to the public, decentralize economic power, and reduce the need for government intervention. The proposed legislation recognized that where technical efficiency would permit only a few firms to operate, it is necessary to ensure that a substantial part of the efficiency gains be transmitted to the public, and that these gains be protected against the abuses of market power.²¹ In addition, it was an objective of the legislation to promote honest and fair dealing in the market.

The *Explanatory Notes* that accompanied Bill C-256 emphasized both efficiency and dispersion of economic power as objectives of competition policy:

In economic terms, competition policy is designed to ensure

that Canada makes the most efficient use possible of its resources. In this sense there is no room for waste, and waste occurs if the marketplace is not functioning properly, if there is no room for the new businessman or entrepreneur, if there is no choice of goods and services, or if competition is frustrated by men who would make deals at the expense of others.

But the considerations of competition policy go well beyond economics alone. Concentrations of power, which can serve to restrict opportunity and individual freedom, are not acceptable in today's social and political environment and a major objective of competition policy must be to ensure that such concentrations of power are not allowed to develop. (Bureau of Competition Policy, 1971, pp. 8-9.)

As we have indicated, Bill C-256 embraced a number of objectives for competition policy, which are almost certainly not mutually exclusive. The efficiency objective was the one given the most weight. This is made clear by an analysis of the Minister's speeches following the introduction of the bill. In a speech to the Canadian Chamber of Commerce, Mr. Basford (1971b, p. 5) stated:

The cornerstone of our policy, as the preamble clearly sets out, is that competition is the best means of attaining efficiency in the Canadian economy. It is our conviction — and this is carried through every part of the Act — that through the free interplay of market forces, our manpower, capital and natural resources will be directed into the most productive channels; that effective competition in our markets will provide a spur to greater productivity among Canadian industry; that the need to keep ahead of the competition will lead to progressive technological change and innovation; that Canadian industry will be in a better position to ensure and increase its ability to compete with foreign concerns in both domestic and international markets.

The relationship between competition and efficiency, in the context of Bill C-256, was also emphasized by the Minister: "First, we want to achieve efficiency in the Canadian economy and second, we feel that competition in the Canadian marketplace will bring this about. The goal is efficiency, not competition for competition's sake. And I can't emphasize that point strongly enough." (Basford, 1971c, p. 6.)

Yet on the same page in this speech to a University of Alberta seminar on the bill, Mr. Basford also found it necessary to reassure businessmen that the benefits had to be passed on to consumers

(obviously a distributional issue) *only* where a merger was deemed to have "a restrictive effect on competition."²²

The principle in the Bill that seems to have caused some confusion is the requirement that efficiency benefits gained from mergers are to be passed on to the consumer under certain circumstances. It is important to recognize, however, that this does not apply to all mergers, only those shown to have a restrictive effect on competition. The intent is nothing more than to ensure that mergers do not become a vehicle for establishing private monopolies, with the benefits wholly retained by the parties to the merger. There are costs to the marketplace as a whole when competition is adversely affected and it is not an unreasonable proposition in my view to suggest that some form of compensation should be provided to offset this. (Basford, 1971c, p. 6.)

The Minister further explained that the efficiency benefits need not be passed on immediately, but only within "a reasonable time, which would depend entirely on the nature of the process that would produce the benefits." (P. 6.) The practical aspects of this requirement in Bill C-256 would, it appears, have militated against its effectiveness if the bill had become law. The rank order of the objectives embodied in C-256 were emphasized again by the Minister in this speech: "Where there is a potential conflict between competition and achieving efficiency, the issue is resolved in favour of efficiency so long as some of the benefit is passed on to the public."²³ (Basford, 1971c, p. 8.)

Bill C-256 met fierce opposition from the business community. Mr. Basford was moved to another portfolio. The Liberal government was reduced to minority status in the general election of 1972. In mid-1973 the government announced that reforms would be divided into two stages and take the form of amendments to the existing legislation. The Stage I amendments (for which there was no preamble) were introduced in November 1973, but were not passed until late in 1975 and then only after extensive changes were made in response to well-organized business lobbying. (Stanbury, 1977a.)

The Dynamic Change Report

In preparation for the State II amendments to the *Combines Investigation Act*, the Department of Consumer and Corporate Affairs commissioned a series of studies by experts on various facets of competition policy. The most influential report was prepared by Professor L.A. Skeoch with B.C. McDonald.²⁴ Released in May 1976, it was entitled *Dynamic Change and Accountability in a Canadian Market Economy*.

The central focus of this report²⁵ was captured by the first two words of its title. Skeoch *et al.* saw the role of competition policy as follows:

The central hypothesis of this report is that the role of government policy should be not to direct and manage the economy in detail but to facilitate change and thus release and reinvigorate the dynamic forces that have been responsible for the prodigious economic growth that the market-directed, private enterprise system has demonstrated it is capable of achieving. (Skeoch-McDonald, 1976, p. 202.)

They saw their policy proposals as those which "will most effectively facilitate long-run dynamic change within the Canadian economy, that will encourage the adoption of real-cost economies, and that will discourage restraints which result from mere market power rather than from superior economic performance." (*Ibid.*, p. ii.)

As we have noted, Skeoch-McDonald wished to "release and reinvigorate the dynamic forces" that they saw to be the key to economic growth in the context of a private enterprise economy. They stressed that the objectives of competition policy should be to facilitate the process of economic change. They stated: "The benefits from dynamic change will, however, only materialize in the long run as industry gradually exploits opportunities for economies of scale, for organizational innovations, and for improvements in management efficiency." (Skeoch-McDonald, 1976, p. 36.) They saw that the job of the policy maker was to "encourage the private sector to adopt patterns of conduct that will promote dynamic change and avoid artificial restraints." (*Ibid.*, p. 23.) In particular, "the problem is how to facilitate the process of change by policies of general application and at the same time to assist the individual to adjust to the changes that do occur." (*Ibid.*, p. 10.)

Skeoch's views were foreshadowed at least four years earlier in respect to Bill C-256 introduced in 1971. He emphasized that the objective of competition legislation should not be static allocative

efficiency, but rather "dynamic efficiency" in the sense of encouraging innovation and technological change. Skeoch (1972, p. 8) said,

... the central focus of policy relating to industrial organization should be to promote dynamic change and growth through encouraging flexibility and adaptability in the economy. Such a policy must emphasize not the efficient allocation of existing resources among alternative uses in terms of keeping down costs and profits, but the encouragement of new methods of production and distribution, the development of new institutions for liberating and expanding the growth opportunities in the economy.

If the Skeoch-McDonald report emphasized the dynamic elements of the efficiency objective, it did not entirely neglect the question of technical efficiency. For example, in their multi-stage procedure for assessing mergers they made it clear that where the social benefits of the real cost economies in both production and distribution outweigh the costs of increased market power, the merger was to be permitted. (Skeoch-McDonald, 1976, pp. 84-89.) They advocated structural rationalization and specialization agreements to achieve real cost economies of scale where such agreements were initiated by the firms involved and filed with the Bureau of Competition Policy. (*Ibid.*, pp. 176-77.)

With respect to price discrimination (including "predatory pricing"), loss-leader selling and basing-point pricing schemes, Skeoch-McDonald (1976, p. 219) rejected the U.S. type of cost-justification approach and proposed that the criterion be the selling price in relation to the "reasonably anticipated long-run cost of production." This concept is one that recognizes the dynamic elements in firm and industry behaviour.

The Proposed Stage II Amendments

On 16 March 1977 the Minister of Consumer and Corporate Affairs introduced Bill C-42 in the House of Commons. It embodied the Stage II amendments to the *Combines Investigation Act*, which was to be renamed the *Competition Act*. Like the Act of the same name in 1971, Bill C-42 contained a preamble that stated the purposes of the legislation.

Whereas a central purpose of Canadian public policy is to promote the national interest and the interest of individual Canadians by providing an economic environment that is *conducive to the efficient allocation and utilization of society's resources, stimulates innovation in technology and organization*, expands opportunities relating to both domestic and export markets and encourages the transmission of those benefits to society in an equitable manner;

And whereas one of the basic conditions requisite to the achievement of that purpose is the *creation and maintenance of a flexible, adaptable and dynamic Canadian economy* that will facilitate the movement of talents and resources in response to market incentives, that will reduce or remove barriers to such mobility, except where such barriers may be inherent in economies of scale or in the achievement of other savings of resources, and that will protect freedom of economic opportunity and choice by discouraging unnecessary concentration and the predatory exercise of economic power and by reducing the need for detailed public regulation of economic activity;

And whereas *the effective functioning of such a market economy may only be ensured through the recognition and encouragement of the role of competition in the Canadian economy as a matter of national policy* by means of the enactment of general laws of general application throughout Canada and by the administration of such laws in a consistent and uniform manner . . . (Canada, 1977a, p. 135. Emphasis added.)

While Skeoch was later to say that Bill C-42 and its successor C-13, failed to put into statutory language his emphasis on the dynamic elements,²⁶ the preamble certainly appears to have used the language of the *Dynamic Change* report. It speaks of stimulating innovation, expanding opportunities, creating a "flexible, adaptable and dynamic . . . economy", and reducing barriers to the mobility of economic resources. On the other hand, it also speaks of the distribution of the benefits of allocative efficiency, the importance of technical efficiency and the need to discourage unnecessary concentration.

Our analysis of the substantive provisions,²⁷ that is, the criminal offence and civil reviewable matters sections, indicates that the primary concern was to achieve technical efficiency. This is most evident in section 31.71, which dealt with mergers. First, horizontal mergers where the combined market share of the merging firms is less than 20 per cent of the market were to be exempt from possible

review.²⁸ Secondly, only mergers that substantially lessened competition were to be subject to an order by the newly proposed civil, quasi-judicial tribunal, the Competition Board. Thirdly, the Board was specifically barred from prohibiting or dissolving a merger that substantially lessened competition if the merger "has brought about or . . . there is a clear probability that it will bring about substantial gains in efficiency . . ." (S. 31.71(5).) Fourthly, the Board was prohibited from making its approval of any merger conditional upon a reduction in tariffs unless the merger resulted in virtually complete control of the market, and where such a reduction in tariffs (or non-tariff barriers) would prevent the new firm from having virtually complete control. Even in these circumstances, the Board was not required to make its approval conditional upon a reduction in tariffs.

In both the civil monopolization and joint monopolization sections (ss. 31.72 and 31.73 respectively) there was an efficiency defence.²⁹ It provided that no order could be made by the Board where it found that the firm's(s') behaviour which had had the effect of restricting entry or foreclosing a competitor's sales outlets or sources of supply "solely reflects superior efficiency or superior economic performance."³⁰

Under section 31.76, firms could propose a specialization agreement to the Board.³¹ The Board was required to allow such an agreement for up to five years, even if it lessened competition substantially, provided the agreement "is likely to bring about substantial gains in efficiency." (S. 31.76(2)(a).) The Board could condition its approval upon a reduction in tariffs and so on if the agreement lessened competition substantially, but it was not required to do so. (S. 31.76(3).)

The Senate Committee on Banking, Trade and Commerce (Canada, 1977c, p. 12) criticized Bill C-42 as not embodying the dynamic efficiency objectives emphasized in the Skeoch-McDonald report:

In the guise of enhancing competition in the market-place as a better means of achieving economic efficiency than detailed public regulation would be, Bill C-42 in fact provides stricter regulation over mergers, cartels and monopolies through their legitimation. Through a broadening of the definition of mergers, Bill C-42 also sweeps into the control and overview of the Competition Policy Advocate practically every acquisition of property and shares of every business in Canada either by acquisition, lease, amalgamation or establishment of a joint venture. The Competition Board will have the authority to

make the most detailed regulation of every business in Canada. It might well be said, in the view of your Committee, that the Bill is the cornerstone of a comprehensively government-planned economy.

Although it was the subject of a major report by a House of Commons committee,³² Bill C-42 did not move beyond Second Reading. Instead, it was replaced by Bill C-13, which was given First Reading in November 1977. Although a number of important changes were made in this second version of the Stage II amendments (see Stanbury, 1979b), they did not alter the preamble nor the emphasis on technical efficiency as a policy objective in the merger monopolization, joint monopolization or specialization agreement sections.

Bill C-13 did not get beyond First Reading and died on the Order Paper in 1978. The short-lived Progressive Conservative government (June 1979–April 1980) had little opportunity to introduce new legislation. It should be noted, however, that during the election campaign in 1979, Joe Clark, leader of the Tories, stated in an interview that the reform of competition policy was not a high priority for his party. (Stanbury, in process.)

Efficiency as the primary objective of competition-policy legislation was reinforced by the federal government's recent White Paper released in May 1977:³³ "Agenda for Co-operation: A Discussion Paper on Decontrol and Post-Control Issues". This Paper reiterated the theme that "The market system is an efficient mechanism for allocating resources." (Canada, 1977d, p. 15.) It was argued that "Governments have a responsibility to see that the framework within which markets work supports their efficiency and flexibility rather than inhibiting them." (*Ibid.*, pp. 15–16.) With respect to competition policy in particular, the White Paper stated:

Competition policy is a good example of the role the government can play in enhancing the efficiency of the market system and in encouraging economic growth. The government's aim is to carefully examine activities which artificially restrict competition and to oppose them unless there are compensating benefits to the Canadian public. It recognizes that there will be circumstances where mergers enhance the economic efficiency and competitive strength of certain industries on international markets. These may be justified provided the consumer is protected from subsequent abuse of market power. (Canada, 1977d, p. 17.)

The 1980s

The next attempt to reform competition legislation³⁴ occurred in May 1981, when the Minister of Consumer and Corporate Affairs circulated copies of a twenty-one-page paper entitled "Proposals for Amending the Combines Investigation Act: A Framework for Discussion". (Canada, 1981b.) It contained no reference to economic efficiency as an objective of competition policy. In general terms, the Minister wished to make use of a structural approach³⁵ in dealing with mergers and monopolization. Efficiency considerations (allocative, technical or dynamic) were not expressly part of that approach, although provision was made for specialization agreements and for an efficiency defence in the merger section.

Later in 1981 the Minister indicated that there were three objectives that competition policy was designed to achieve:

First, to promote efficiency, innovation and productivity in the Canadian economy;³⁶

Second, to prevent abuses of market power and by so doing promote fairness to consumers and smaller businesses; and

Third, to ensure markets perform their basic function of allocating resources, thereby reducing the need for direct government regulation. (Ouellet, 1981b, p. 7.)

But is efficiency the most important objective? Speaking in the same month, the Director of Investigation and Research indicated that:

The primary objective of Canadian anti-trust policy is economic efficiency, attained by the promotion of a competitive environment which enables impersonal markets to determine the optimum resource allocation. The means of achieving this objective is the design and enforcement of laws which prevent artificial restraints on normal market forces. (Hunter, 1981, p. 2.)

The efficiency objective is apparently alive and well and living in Ottawa as a major justification behind successive attempts to reform the legislation.³⁷

Notes

1. Three sets of optimality conditions must hold: the marginal rate of substitution between goods must be the same for all consumers, the marginal productivity ratios of all inputs must be the same across all

outputs, and the ratio of marginal cost to marginal utility must be the same for each commodity.

2. Bain (1968, pp. 376-77) points out that technical efficiency "is measured by how closely the firms in an industry approximate the lowest attainable costs for the actual outputs they produce and distribute." He goes on to say that "the cost measure of efficiency is not influenced by 'strictly pecuniary' considerations . . . revolving around possible variations in the money prices that firms may pay for given resources . . ." Technical efficiency depends upon a number of factors:

. . . the horizontal size or scale of plants . . . the degree of vertical integration of plants and firms . . . the long-run rate of utilization of existing plant capacity . . . and the degree of managerial wisdom in selecting and using productive techniques and methods, in selecting cost-minimizing combinations of productive factors or agents, in designing administrative organizations and in administering operations.

3. For a recent review, see Gold (1981). The dynamic elements are emphasized in Skeoch-McDonald (1976). Joseph Schumpeter (1950) was an early advocate of the importance of the "gale of creative destruction" that produced the growing wealth of capitalism.
4. Robert Bork (1978, p. 51), Professor of Law at Yale University and former Solicitor General of the United States, has argued strongly that "the only legitimate goal of American antitrust law is the maximization of consumer welfare." Bork (*ibid.*, p. 90) equates consumer welfare with allocative efficiency, for he states: "Consumer welfare is greatest when society's economic resources are allocated so that consumers are able to satisfy their wants as fully as technological constraints permit." He goes on to say that "consumer welfare, in this sense, is merely another term for the wealth of the nation." For Bork (*ibid.*, p. 91), "the law's mission is to preserve, improve, and reinforce the powerful economic mechanisms that compel businesses to respond to consumers." His concept of "overall efficiency" includes both allocative efficiency and "productive efficiency", by which he (*ibid.*, p. 91, n.) means "the effective use of resources by particular firms . . . [which] encompasses much more than mere technical or plant-level efficiency." Bork (*ibid.*, p. 91) summarizes his position by saying: "The whole task of antitrust can be summed up as the effort to improve allocative efficiency without impairing productive efficiency so greatly as to produce either no gain or a net loss in consumer welfare." A similar view can be found in Areeda and Turner (1980, Vol. 1, pp. 7-33).

Robert Pitofsky, a law professor who became a member of the Federal Trade Commission, presents an eloquent argument for the idea that certain *political* values ought to be taken into account in interpreting the U.S. antitrust laws. Bork's position is too narrow, for as Pitofsky (1979, p. 1051) argues:

It is bad history, bad policy, and bad law to exclude certain political values in interpreting the antitrust laws. By "political values," I mean, first, a fear that excessive concentration of economic power will breed antidemocratic political pressures, and second, a desire to enhance individual and business freedom by reducing the range within which private discretion by a few in the economic sphere controls the welfare of all. A third and overriding political concern is that if the free-market sector of the economy is allowed to develop under antitrust rules that are blind to all but economic concerns, the likely result will be an economy so dominated by a few corporate giants that it will be impossible for the state not to play a more intrusive role in economic affairs.

See also Schwartz (1979) and Kauper (1980).

5. The classic statement of this view is that of Schumpeter (1950, pp. 84-85):

... the problem that is usually being visualized is how capitalism administers existing structures, whereas the relevant problem is how it creates and destroys them. ... in capitalist reality as distinguished from its textbook picture, it is not that kind of competition which counts but the competition from the new commodity, the new technology, the new source of supply, the new type of organization ... competition which commands a decisive cost or quality advantage and which strikes not at the margins of the profits and the outputs of the existing firms but at their foundations and their very lives. This kind of competition is as much more effective than the other as a bombardment is in comparison with forcing a door, and so much more important that it becomes a matter of comparative indifference whether competition in the ordinary sense functions more or less promptly; the powerful lever that in the long run expands output and brings down prices is in any case made of other stuff.

A very similar version of Bladen's views can be found in Stykolt and Bladen (1957). See also Stykolt (1956).

6. This report was prepared by a special committee of which Fred A. McGregor, Commissioner, *Combines Investigation Act*, was chairman. See Canada (1945a).
7. See Canada (1945b).
8. The legislative history of Canadian competition policy is described in Stanbury (1981a) and Magwood (1981).
9. CD = House of Commons, *Debates*
SD = Senate, *Debates*.

10. As we shall see below, these words are remarkably similar to the ones used by several Ministers of Consumer and Corporate Affairs in the 1970s and early 1980s.
11. The amendments are described in Rosenbluth and Thorburn (1963).
12. See the discussion on "preserving the free enterprise system" in Chapter 5.
13. They are described in Rosenbluth and Thorburn (1963) and more briefly in Stanbury (1981a) and Magwood (1981).
14. *Annual Report of the Director of Investigation and Research*, . . . for the year ended 31 March 1962 (Ottawa: Queen's Printer, 1962), p. 8.
15. By 1978 it was estimated that 29 per cent of Gross Domestic Product at factor cost was subject to government regulation of price and/or output including entry. See Economic Council of Canada (1979, Table B24, p. 124).
16. *Annual Report of the Director*, . . . for the year ended 31 March 1964, pp. 7-8.
17. Mr. Henry's apparent acceptance of conscious parallelism without agreement is discussed in Stanbury and Reschenthaler (1977). (Mr. Henry was appointed a judge of the Supreme Court of Ontario in 1973.) This view might be contrasted to that of F.A. McGregor. He saw his job as "keeping competition working, or to restore it to working order, in those fields in which it is necessary as a public safeguard." McGregor saw competition as a powerful force to "produce the goods", as a stimulator to invention and innovation, and to find less costly ways of doing things. He said that price competition "is, of course, the really vital element in any competitive system", and he explained why competition among reasonable substitutes and the possibilities of potential competition are insufficient protection against higher prices. (McGregor, 1946b, pp. 6, 8.) Henry's predecessor, T.D. MacDonald (1952, p. 3), argued that it was not the intent of the legislation "to turn back the clock or to seek to impose upon one state of society a set of rules designed for an earlier state or a hypothetical state [i.e., perfect competition]." However, he said, "In its provisions relating to combinations, it is the purpose to preserve the highest degree of competition of which any given situation is capable and which is in the interest of the public."
18. Between 1 January and 1 October 1966 the Office of the Director of Investigation and Research was lodged under the President of the Privy Council, at which time it was transferred to the Department of the Registrar General. Finally, on 21 December 1967, this new department was transformed into the Department of Consumer and Corporate Affairs. It was Mr. Favreau who was instrumental in having the whole matter of competition policy referred to the Economic Council of Canada, which produced a report published in mid-1969. See Economic Council of Canada (1969).

19. See, for example, Gorecki (1976).
20. The proposed amendments are described in Stanbury (1977a); Canada (1971a); and Skeoch (1972).
21. Recall the discussion in Chapter 2.
22. Note that if the merger resulted in the restriction of output, it would result in allocative inefficiency.
23. The same point was made in Mr. Basford's speech two days later to a similar seminar sponsored by the Faculty of Commerce and Business Administration of the University of British Columbia.
24. The study was done in consultation with two prominent businessmen, W.O. Twaits, the former Chairman of the Board of Imperial Oil Ltd., and M. Bélanger, then President of the Montreal Stock Exchange, and R.M. Bromstein, a lawyer who frequently represented small business firms.
25. For a summary and critique of the report, see Stanbury (1977b).
26. See his testimony before the Senate Standing Committee on Banking, Trade and Commerce in respect to Bill C-13 in 1978; see also Skeoch (1979).
27. In general, see Rochweg (1977) and Stanbury (1979c).
28. See MacCrimmon and Stanbury (1978).
29. See Stanbury (1978a) for a more complete discussion.
30. See ss. 31.72(5) and 31.73(5) of Bill C-42.
31. See Gorecki (1977) and Stegemann (1977) for a more complete discussion.
32. See Canada (1977b) and MacCrimmon and Stanbury (1977).
33. Canada's experience with wage and price controls between 1975 and 1978 is described in Maslove and Swimmer (1980).
34. In February 1979 the Minister of Consumer and Corporate Affairs stated in the House of Commons that he was ready to introduce a *third* version of the Stage II amendments to the *Combines Investigation Act*. However, the House was dissolved shortly thereafter, and the Progressive Conservatives formed a minority government in June 1979 after the general election.
35. The "Proposals" were aimed at reducing the complexity of the legislation (and thereby reducing uncertainty), and at making the law more concise and understandable. See Canada (1981b, pp. 1-2). They are analysed in Stanbury and Reschenthaler (1981); Lecraw (1981); and Block (1982). See also "The Competition Bill: A Review," *Canadian Consumer* (July 1982), p. 7 and "The Competition Bill: Interview with André Ouellet," *Canadian Consumer* (July 1982), pp. 8-9.
In a speech just before the "Proposals" were circulated, the Minister of Consumer and Corporate Affairs stated:

Some are concerned, I know, over the big lawmaking machine coming into your private territory. Let me assure you, however, that unlike my predecessors, *I have abandoned all thought of trying to offer you "the best law in North America." I have given up the idea of perfection and the absolute.* The law I am proposing to you today is straightforward, practical and realistic. It attacks the most urgent problems, and consistently avoids those complicated procedures whose effectiveness is still doubtful. (Ouellet, 1981b, p. 5. Emphasis added.)

36. In a speech some months earlier, the Minister expanded on this theme, saying:

... the establishment of policies aimed at creating and maintaining vigorous competition in Canada transcends the interest of any one group. They serve the interests of Canadians generally in contributing to the development of a strong, dynamic and innovative economy and the creation of productive, well-paying jobs. (Ouellet, 1981a, p. 13.)

37. On 12 August 1983 André Ouellet was moved from Consumer and Corporate Affairs to Labour. Ms. Judy Erola, formerly Minister of State for Mines, was appointed Minister of Consumer and Corporate Affairs. She said shortly thereafter that she wanted to see new competition legislation introduced, but there was a problem of timing. See Jennifer Lewington, "New Competition Policy up in the Air, Erola Feels", *Globe and Mail* (24 August 1983), p. A1. Ms. Erola was *Chatelaine* magazine's Woman of the Year in 1983. See *Chatelaine* (January 1983), p. 48.

5: *The Lesser Objectives of Canadian Competition Policy*

Introduction

In this chapter we present a number of other objectives of competition policy that may be considered of lesser importance in relation to those discussed and analysed in Chapters 2, 3 and 4. Although less important themes, these lesser objectives were nevertheless of considerable significance for short periods of time, in contrast to the more enduring major objectives of competition policy. For example, 'declaring the common law' was of equal importance with preventing abuses of economic power at the time that the original legislation was enacted in 1889. All of the minor objectives, with one exception, were articulated primarily by elected representatives, often in response to short-term economic and political problems. Of the six lesser objectives, one — political compromise — is quite different from the others. Rather than defining the objectives of competition policy in terms of some substantive end (such as achieving economic efficiency), competition legislation and its enforcement are seen as the product of a compromise between contending political forces.

The body of the chapter is divided into the following major sections, each of which represents one of the lesser objectives of competition policy:

- Declaring the Common Law
- Fighting Inflation
- Protecting Small Business
- Preserving the Free Enterprise System

- Ensuring Fairness and Honesty in the Market-place
- Competition Policy as a Political Compromise

Declaring the Common Law

Canada's first competition legislation, *An Act for the Prevention and Suppression of Combinations formed in Restraint of Trade*, came into effect in 1889 (52 Victoria, c.41). It followed the *Report of the Select Committee of the House of Commons to Investigate and Report Upon Alleged Combinations in Manufactures, Trade and Insurance in Canada*.¹ The Committee unanimously condemned the combines, which it found to be widespread in Canada at the time.

On 18 May 1888, Mr. Wallace introduced a private member's bill (Bill No. 138) to deal with the problem. It contained only three clauses.² In presenting the bill Mr. Wallace argued that:

... these combines are most tyrannical, arbitrary and exclusive in their character; that they enhance prices to the consumer; that they prevent competition, and that under the cloak of law or under pretense of being attached, [*sic*] as in Toronto, . . . they have been doing acts which are entirely illegal . . .³ (CD, 18 May 1888, p. 1544.)

In his last few words Mr. Wallace presaged his argument (and also that of other M.P.'s—including the Minister of Justice) that the proposed legislation simply declared in statutory form the position of the common law. Because the bill was introduced only a day or two before the end of the session, no action was taken on it in 1888.

The Act of 1889

On 6 February 1889 Mr. Wallace introduced Bill No. 11, which was identical to the one introduced in 1888. On 8 April it was given Second Reading. During the course of the debate, Mr. Wallace gave notice that he proposed to substitute a *second* bill for the one introduced on 6 February. He gave his reasons as follows:

The objection made to the old Bill was that it created a new offence, and the judges might perhaps interpret the Bill more severely than was intended. This new Bill does not create a new offence. It simply states what the law of England and Canada today is and has been for years past, and fixes a penalty for

offences against the law and warns them not to break it. (CD, 8 April 1889, p. 1113.)

The heart of the second Wallace bill was quite different from the first.⁴

As the bill itself clearly indicates, it was Mr. Wallace himself who inserted the crucial word 'unlawfully' into the first competition bill.⁵ He did so, apparently, because he believed, or had been persuaded, that this word would make it clear that the purpose of the new Act was simply to declare the existing common law on restraint of trade as indicated in the preamble.⁶ He, along with the Minister of Justice and virtually all other M.P.'s, was sadly mistaken as we shall describe.

On 22 April, in discussion in the Committee of the Whole on Wallace's second bill, Mr. Mills (Bothwell) thought that the original bill went beyond the common law. He said it

... proposed to make a crime which is not a crime now; he proposed to declare some acts unlawful which are not unlawful by common law; and if we are simply going to engage in declaratory legislation, upon which there has hitherto been no doubt, we are entering upon a new policy altogether. (CD, 22 April 1889, p. 1437.)

The Minister of Justice, who thought the bill to be merely declaratory of the common law, gave some reasons why it was, nevertheless, useful to enact it:

It is true that offences of this kind are at present unlawful as conspiracies, and that very severe penalties are attached to conspiracies by the Revised Statutes, but I will venture to say that there are not two persons in Canada outside the legal profession, who knew before this Bill was introduced that unlawful conspiring in respect to trade was conspiracy punishable under the Act with five years' imprisonment. They will know the law hereafter. . . . (CD, 22 April 1889, p. 1439.)

Mr. Davies (M.P. for P.E.I.) challenged the efficacy of Mr. Wallace's second bill. He said, "the Bill . . . is one of the greatest frauds I ever read." (CD, 22 April 1889, p. 1439.) He went on to argue that while the original bill proposed by Wallace "if defective in construction, inartistically drawn, and going perhaps too far . . . seemed at any rate to be honestly framed to strike at the evils [the Committee of 1888] reported upon." (*Ibid.*, p. 1439.)

Later in the debate, Mr. Colter, a Liberal M.P., pointed out that:

... by introducing this word 'unlawful', you simply revert to the common law This Bill simply continues that which exists at present . . . and it has been said by many that the common law is obsolete, and to some extent uncertain; therefore we are only giving to the people something uncertain, and only likely to end in disastrous failure. (CD, 22 April 1889, p. 1445.)

He went on to say that since "the common law has proved unavailing to meet those evils [industrial combines] in the past, it must necessarily prove unavailing under this Bill also." (*Ibid.*, p. 1445.) A Conservative M.P., Mr Guillet, went to some pains to explain why it was necessary to insert the word 'unlawfully' prior to subclauses (a) to (d).

A great deal of ridicule has been endeavored to be thrown upon the Bill because it provides that unlawful acts should be punished. It was well explained in the Banking and Commerce Committee by the highest legal authority in this country that the word "unlawful" was necessary in order to prevent the law being applied to proper and innocent restraints of trade. The Minister of Justice explained that under this Bill unless the word "unlawful" were inserted, if a railway company withdrew one train service a day, while still giving ample accommodation by running two trains a day, it would be liable to the penalty simply because it withdrew that unnecessary train. In the same way, under this section with regard to limiting or lessening the manufacture or production, if the word unlawful were not inserted, any individual producer or importer or vessel owner or grain dealer would be liable to the penalty if he chose to close down his industry or refrained from selling his grain, or laid up his vessel. The manufacturer or the individual has a right to do what he likes with his own industry and capital. It is only when combinations exist that they become unlawful in the common law, and, therefore, that word must be inserted in order to prevent individuals, in the exercise of their right, from being punished. (CD, 22 April 1889, p. 1446.)

The House accepted the amendments of the Banking and Commerce Committee, gave the bill Third Reading and sent it to the Senate. During the debate on Second Reading, Senator Macdonald asked what was the meaning of the word 'unlawfully', "because upon

that really hangs the whole importance of the following sections." (SD, 26 April 1889, pp. 621-22.)

Three days later, in the debate on Third Reading, Senator Vidal began by requesting that 'unduly' be inserted so that "the mere fact of limiting or restraining, which might be, to a reasonable extent, should not be made a criminal offence." (SD, 29 April 1889, pp. 631-32.) He indicated it would be left to a judge to determine whether the restraint was undue. Senator Power, in responding to this request, indicated that the problem was already solved by the use of the word 'unlawfully'. He went on to argue that the bill "simply undertakes to provide penalties for the doing of certain things which are, under the existing law, unlawful." (*Ibid.*, p. 632.) He then indicated prophetically, "If we want to make a good and effective Bill we should strike out the word 'unlawfully'." (*Ibid.*, p. 632.) Senator Vidal averred there was a distinction between 'unduly' and 'unlawfully' and moved to insert the former word in the bill. (*Ibid.*, p. 632.)

Senator Kaulbach opposed the amendment and argued that "it creates no new offence, but simply declares what the common law is. . . ." (SD, 29 April 1889, p. 632.) Senator Scott argued that by the use of the word 'unlawfully', the bill was only providing for penalties for "certain things now that are contrary to the common law of the country. . . ." (*Ibid.*) He stated that by inserting the "qualifying word 'unduly'" the Senate "should therefore be altering the law in the direction of favoring combines and conspiracies much more than the common law of the country at present will allow."⁷ (*Ibid.*, p. 633.)

The government leader in the Senate, Mr. Abbott, did not see any harm in inserting the word 'unduly' because it "seems so entirely reasonable that the law is not to be made literally to apply to every kind of arrangement that may in some degree limit transportation [and other] facilities, but only to apply to arrangements against the interest of trade." (SD, 29 April 1889, p. 638.) He confessed to not knowing what the meaning of the word 'unlawfully' was as inserted in the bill. Later he said that not all the acts described in the bill were prohibited by the common law. (*Ibid.*, p. 639.)

In addition to weakening the bill by inserting the words 'unduly' and 'unreasonably' as indicated below, the Senate also redrafted the four subclauses.⁸ The final result was a piece of legislation doomed to be totally ineffective. In Lloyd Reynold's (1940, pp. 134-35) words, "members of a combine could not be convicted unless the Crown proved that they were 'unduly' doing something which was already unlawful at common law."⁹

The misconception of Mr. Wallace, his supporters and the Minis-

ter of Justice was enormous.¹⁰ The insertion of the word 'unlawfully' vitiated the legislation, for as Richard Gosse (1962, p. 72) remarks, "since there was no conspiracy in restraint of trade at common law along the lines imagined by the legislators, the bill at this point had become meaningless." Gosse (1962, p. 73) continues, "For a Minister of Justice, who must have had some staff to advise him, this statement shows an appalling lack of knowledge of the common law."

Canadian legislators in 1889 may have thought they were simply declaring the common law, but that was not the case. Gosse (1962, pp. 37, 39), on the basis of his extensive analysis of the common law on conspiracy, states:

The statute did not declare the common law at all. It was not a conspiracy to combine to lessen competition by fixing prices although it might have been a hundred years earlier . . . By 1889 . . . insofar as arrangements to fix prices and restrict output are concerned . . . the idea that such agreements were quite respectable was continually becoming more deeply embedded in the minds of the judiciary.¹¹

Early Attempts to Amend the Act of 1889

Only one year after the first competition legislation was on the books, its proponents began what was to become a decade-long campaign to amend it.¹² Remarkably, they were not seeking to remove the word 'unlawfully', but rather the two words that reduced the force of the enactment but were not fatal to it: 'unduly' and 'unreasonably'.¹³ The history of these attempts reinforces the idea that the proponents of the 1889 legislation believed they were merely putting in statutory form the common law on restraints of trade.

Michael Bliss (1973, pp. 183–84) claims that it was, "by accident" that the Senate in 1900 deleted the word 'unlawfully'. Carman Baggaley (1982) disagrees.¹⁴ In any event, the effect was to give the law some teeth, although the statute continues to incorporate the qualifying word 'unduly' to this day: see the text of section 32 in Appendix A.

Initial Judicial Perceptions

The first combines case brought under the legislation passed in 1889 and put into the *Criminal Code* in 1892 involved the American Tobacco Company of Canada. The Company was acquitted as Dugas, J. ruled that its exclusive-dealing contracts did not constitute an un-

lawful conspiracy in restraint of trade.¹⁵ He stated that the word 'unlawfully' in section 520 meant that the acts complained of "must be acts which were before the passing [of s. 520] unlawful acts under the Common law."¹⁶ It was therefore necessary to "return to the law in existence before the passing of [s. 520]."¹⁷ He indicated that he had referred to the reports of the House and Senate debates at the time the law was proposed. Dugas, J. stated:

... I believe I am reinforced in the views I take on the interpretation of [s. 520] by what was said then . . . by such an able man as the late regretted Sir John Thompson [the Minister of Justice at the time] when he mentioned that the bill proposed did not create a new law, but that it was simply the common law put into shape so as to let the public at large know the consequences of certain combinations or conspiracies forbidden by the common law.¹⁸

This passage is of interest on two counts. First, it reinforces the idea that the original legislation was passed with the objective of declaring the position of the common law and attaching criminal penalties for such offences. Secondly, it suggests that occasionally Canadian judges do examine the legislative debates at the time a law is passed to try to understand the objective(s) of that legislation in order to assist them in interpreting it.¹⁹

Judicial Perceptions Following the Amendments of 1900

In the first case heard under section 520 of the *Criminal Code*, after the deletion of 'unlawfully' and the reinsertion of 'unduly' and 'unreasonably' in 1900, the Crown obtained its first conviction in a combines case. In *R. v. Elliott*, Meredith, J. distinguished the present case from the *Mogul Steamship*²⁰ case and said:

Now it is quite plain that Parliament intended by the enactment to further control the right to hamper and monopolize trade, though, until the second amendment of the Act [in 1900], it seems to have failed strangely to effect such purpose, indeed to have produced quite futile enactments until the word "unlawfully" was eliminated.²¹

The trial judge was wrong in respect to his first point, but he was certainly correct as to his second. In the Court of Appeal, which affirmed the conviction, Osler, J.A. stated that the Act of 1889

"simply imposed penalties in respect of a conspiracy to commit some unlawful act 'unduly' . . . what was or might be unlawful was left to be ascertained by the general law of the land on the subject . . ."²² He further stated that "in the session of 1900 Parliament shewed that it meant to go further [than the common law], and did so, by striking the word 'unlawfully' out of the section, and restoring the word 'unduly' . . ."²³ Essentially the same argument was made in *R. v. Clarke* a few years later.²⁴

In the first combines case to reach the Supreme Court, *Weidman v. Shragge*, in 1912,²⁵ there was a difference of opinion as to whether the law as amended by the deletion of the word 'unlawfully' in 1900 remained simply a declaration of the common law. Mr. Justice Davies held that the statute was simply declaratory of the common law. He stated:

Parliament did not pretend to enact something new as part of the criminal law. It was not creating or defining a new offence before unknown to the law. It was simply, as said in the preamble, "declaring" and formulating what I venture to think the existing law then was, namely, that a conspiracy unlawfully (a) to unduly limit facilities for transportation, etc., or (b) to restrain or injure trade or commerce, or (c) to unduly prevent or lessen production, etc., or (d) to unduly prevent or lessen competition in any article which was a subject of trade or commerce constituted a misdemeanor. Punishments by way of fine and imprisonment were added, of course as sanctions of the declared law.²⁶

On the other hand, Mr. Justice Idington, who concurred with the Chief Justice, held that the statute went beyond the common law:

The whole scope of this legislation is clearly something beyond the narrow limits upon which the reasoning in support of the judgment appealed from seems to proceed. It cannot be said to be a purely declaratory Act. It covers ground not covered by the then existing law. In no sense can the field it covers be held to be co-extensive with the field of law relative to restraint of trade wherein these authorities [cited by the Court of Appeal] had operated.²⁷

Idington, J. pointed out that the *Nordenfelt* case,²⁸ which had been relied upon to show that earlier cases had been overruled, had not been decided by the Privy Council until about five years after the first

competition legislation had been enacted. With respect to the earlier cases, he noted they were hard to follow, yet an offence against public policy was recognized, if ill-defined. The offence did not rest upon criminal law, nor was it a violation of morals. Mr. Justice Idington continued:

Public policy alone it was said required certain limits of time and space to be observed in such contracts, and these limits were measured by that good old word "reasonable" so often found in every phase of our English law. Why should Parliament discard it and adopt another [i.e., 'unduly'] less in use, less easy of comprehension, if merely declaring and clarifying the law as applied in civil cases relative to restraint of trade?²⁹

The problem, of course, is that what Parliamentarians said they were doing and what, in fact, they did were different. Their intent, as evidenced by their words in the debates, is clear: they believed they were putting in statutory form the position of the common law. The words they used in the statute, according to Idington, J. belie this.³⁰ That fact does not alter the nature of the M.P.'s *intent* in passing the legislation of 1889. This would not be the first time that Parliament either misconstrued 'the law' as it stood prior to an enactment or failed to put its intended purpose into the proper language.

Philip Stickland (1936, p. 244) argues that in *Weidman v. Shragge* the Supreme Court of Canada "definitely rejected the common law test as to enforceability of a contract in restraint of trade, and declared that under the statute the whole consideration must be given to the interest of the public." Five years later, however, in *Toronto General Trust v. McEwen*³¹ the Court, in Stickland's (1936, p. 244) words, "disregarded its own holding . . . and declared that a contract in restraint of trade to be unlawful must be shown to be to the detriment of the public or unreasonable as between the parties. The language used is exactly that employed in determining the validity of contracts of this type at common law."

In *Dominion Supply Co. v. Robertson*³² Mr. Justice Clute reviewed *Mitchel v. Reynolds*,³³ *Nordenfelt*,³⁴ *Adelaide Steamship*,³⁵ *North Western Salt*,³⁶ and the *U.S. Standard Oil*³⁷ cases. Particular attention was given to *Adelaide Steamship*, a prosecution under the *Australian Industries Preservation Act* of 1906.³⁸ Clute, J. stated what he held to be the position of the English common law at the time the Act of 1889 was passed:

... the question is considered having regard to its origin under the common law of England, and it is stated that, at the time of the passage of the Anti-trust Act, the English rule was that the individual was free to contract and to abstain from contracting and to exercise every reasonable right in regard thereto, except only as he was restricted from voluntarily and unreasonably or for wrongful purposes restraining his right to carry on his trade.³⁹

Obviously, this is *not* the rule laid down in *Nordenfelt*, which held that for an agreement in restraint of trade to be enforceable, it had to be reasonable both in reference to the interests of the contracting parties and in reference to the interests of the public. After his review of the cases, Mr. Justice Clute concluded that "the provisions of the [Criminal] Code in question are to be construed differently from cases at common law in England to the extent that the Code differs from the common law."⁴⁰

Myths and misconceptions often have remarkably long lives. The idea that the original competition-policy legislation was simply declaratory of the common law can be found in modern times. In *Container Materials*, in 1940, Mr. Justice Hope stated: "the application of the Common Law as found in England and relating to offences as here charged was codified many years ago by the introduction of S. 498 into our *Criminal Code*. This codification was a corollary to the adoption by this country of the economic policy of tariff protection for industry."⁴¹ Fifteen years later Mr. Justice McRuer, in *Northern Electric*,⁴² quoted the second sentence with approval.

In conclusion, we emphasize that whether or not the Act of 1889 and its successors merely declared the common law, it did not become an operational question in the judicial interpretation of the statute. We could find no case that hinged on Parliament's misconception of the position of the common law on restraint of trade just prior to 1889. However it is obvious that in enacting the first anti-combines legislation in 1889, Parliament believed that it was merely declaring the common law.

Fighting Inflation

Our study of the political uses to which the *Combines Investigation Act* and the sections of the *Criminal Code* relating to restrictive trade practices over the period from 1889 to 1983 have been put reveals a somewhat bewildering array of short-term economic and non-

economic objectives. The short-term objectives manifest themselves in two primary ways. In some cases they are responsible for the timing of the changes in the legislation. For example, the inflation of the latter part of the first decade of this century put pressure on the federal government, which introduced the first *Combines Investigation Act* in 1910. It was the first competition-policy reform after fourteen years of Liberal rule. The legislation was also seen to be useful in combatting inflation to facilitate post-war reconstruction after World War II.

Of all the short-term economic objectives for which competition policy has been held to be useful, the control of inflation is perhaps the most prevalent. For example, when Mackenzie King introduced the 1910 *Combines Investigation Act* he commented:

It is this question of the cost of living which has helped to make the question of combines, monopolies, trusts and mergers and the possible effect they may have on prices, so important. In the popular mind there has come to be a gradual association between these two phenomena. (CD, 12 April 1910, p. 6803.)

The fact that the increase in prices, and the formation of these large mergers, and combines have taken place simultaneously, has created in the minds of the people a strong impression that the two are intimately connected, and the public are demanding some kind of legislation . . . to see whether they are right or wrong in that particular. (*Ibid.*, p. 6810.)

While inflation may have created political pressures that contributed to the introduction of the first *Combines Investigation Act*, King gave many reasons for the increase in prices. (CD, 12 April 1910, pp. 6814–18.) He gave little weight to combines as a factor accounting for inflation. King did, however, acknowledge that conspiracies in restraint of trade or trusts may have enhanced prices unduly in some cases. (*Ibid.*, p. 6837.)

Mr. Clark, the M.P. for Red Deer and a self-styled 'Manchester liberal', argued that the real evil at which the 1910 Act was aimed was inflation, but that its remedy was of "the nature of the pill-to-cure-an-earthquake remedy." (CD, 12 April 1910, p. 6865.) He blamed inflation on the National Policy: "The government in a protectionist country, by its fiscal policy, makes the whole country a huge trust . . ." Mr. Clark argued that in Britain, which had a policy of free trade, one did not hear of the problem of trusts or combines nor of the problem of rising prices. (*Ibid.*, p. 6869.) Mr. Wright, on the other hand, read out a list of fifty-three British

'combines' with capital exceeding \$1 million. (*Ibid.*, p. 6892.) As we have seen in Chapter 2, the idea that high tariffs were 'the mother of the trusts' was fairly common among Liberal M.P.'s in 1889. This idea was reiterated in an early combines case.⁴³

In mid-1919 the *Combines Investigation Act* was repealed and replaced with the *Board of Commerce Act* and the *Combines and Fair Prices Act*. They established the first peacetime system of price controls to cope with the inflation engendered by World War I.⁴⁴ The Board was established to administer the Act, which was comprised of two major sections. The first incorporated most of the provisions of the previous *Combines Investigation Act*.⁴⁵

Thomas Traves (1974a, p. 86) describes the other main component of the *Combines and Fair Prices Act* as follows:

... the Board of Commerce was instructed to control or prevent hoarding and to limit undue and unscrupulous increases in the price of necessities of life. This latter term was taken to include food, fuel, and clothing, and any products necessary to their production or derived from them. The powers given to the board to achieve this aim were quite extensive. In cases involving the taking of unfair profits, the board was authorized to determine exact figures as to a fair return and to compel businesses to sell at those figures. This provision involved the right to control the output, price, and, to some extent, distribution policies of individual firms. To ensure compliance with such regulations, violation of board orders was made an indictable offence punishable by fines and prison sentences.

The Board met with both political and constitutional controversy and operated for eighteen months.⁴⁶ Both Acts were held to be unconstitutional.⁴⁷ In introducing direct controls, the government recognized that the competition-policy statute itself was unable to cope with a period of rapid inflation.

The federal government had learned some lessons from the experience of World War I when World War II began. On 3 September 1939 the Wartime Prices and Trade Board was established. The then Commissioner under the *Combines Investigation Act*, and former secretary to Mackenzie King, Fred A. McGregor, became a member of the Board. The Maximum Prices Regulations came into effect on 1 December 1941. McGregor became Enforcement Administrator of the Board. The price ceilings were not suspended until January 1947. (See Magwood, 1981.)

After the World War II control period, competition policy was

seen as an integral part of the establishment of normal peacetime free market conditions. In his *Annual Report* for 1944/45 (p. 6), the Commissioner commented, "Attention is being given to adapting the organization and nature of operations under the Combines Investigation Act to the need for providing further safeguards against the development and exercise of monopolistic restraints of trade in the post-war period." At that time, economists and politicians believed that the central problem in the post-war period would be unemployment. They were wrong. Within a year or two inflation was the central problem. It was greatly exacerbated by the Korean War.

Inflation led to the appointment of a Royal Commission on Prices, which reported in two volumes in 1949. The Commission concluded that inflation had not been caused by the exercise of monopoly power.

In late 1951, when resale price maintenance was unconditionally banned, one of the reasons given was that it would moderate the inflation caused by the Korean War. Mr. Garson (1951, pp. 3-4), the Minister of Justice, remarked that the *Combines Investigation Act* "has been and is being used to prevent the present high prices largely caused by a limited supply and a heavy demand from being driven higher still by illegal price-fixing agreement or combines."

Twenty years later, just before Bill C-256 was given First Reading in Parliament, the Minister of Consumer and Corporate Affairs, Mr. Basford, explained how competition policy, while indirect and less immediate in its impact than monetary or fiscal policy, "can help to moderate inflation in several ways":

For example, one of the typical preoccupations of competition policy is to lower barriers to the entry of potentially more efficient firms into industries where prices and costs are unnecessarily high. Another example involves sectors of the economy where there is no substantial competition and as a result, firms do not offer strong resistance to inflationary wage increases while at the same time high profits stimulate trade union pressures for such increases. Moreover, increased prices and wages in such industries provoke parallel demands for higher wages in other industries. (Basford, 1971e, p. 4.)

Herb Gray, one of Mr. Basford's successors, twice appeared before the House of Commons Special Committee on Trends in Food Prices in the spring of 1973. He spoke of the role of competition policy in combatting inflation: "Continued enforcement of the

legislation, while not having an immediate and direct effect on individual prices can be expected, I think, on a continuing basis to inhibit restraints on competitive market forces and thus exercise downward pressure on prices." (Canada, 1973b, pp. 7-8.)⁴⁸

On 27 April 1973 Mr. Gray announced the creation of the Food Prices Review Board to prepare quarterly reviews of trends in food prices and undertake special inquiries into the causes of particular increases in food prices. Mrs. Beryl Plumptre was appointed chairman of the FPRB two days later. She was a former president of the Consumers' Association of Canada. The Board was to have a colourful history and to publish more than two score studies on food prices and related matters.⁴⁹ Inflation worsened, and in October 1975 the federal government imposed wage and price controls and established the Anti-Inflation Board to administer them.⁵⁰

Having failed to push into law Bill C-13, introduced in November 1977, the Minister of Consumer and Corporate Affairs, when faced with the opposition's attack upon the government for failing to control double-digit rates of inflation in early 1979, argued that a new, tougher, competition policy would help to ameliorate the problem. Mr. Allmand announced that he was "fed up and the consumers whose interests I represent are fed up with the seemingly unending increase in prices." (CD, 27 February 1979, p. 3649). He went on to list a number of measures introduced by the Liberal government "to ease the burden of rising prices", for example, the subsidization of imported oil.⁵¹ He noted that the food component of the Consumer Price Index had increased by 13.5 per cent over the previous twelve months. (*Ibid.*, p. 3650.) Mr. Allmand rejected the idea that high profits in the food-processing industries were responsible for the increase. (*Ibid.*, p. 3651.) The Minister asserted that his department had been "very active" in pursuing actions under the *Combines Investigation Act*,

... regarding such things as price fixing, price discrimination, market rigging, predatory pricing, misleading advertising, double-ticketing and so on, which are all marketing offences and illegal under the *Combines Investigation Act*. We have been extremely successful in gaining convictions against many companies for these things. (CD 27 February 1979, p. 3651.)

He concluded his statement with a call for support for new competition legislation as follows:

Finally, Mr. Speaker, we intend to bring in very shortly once

again, reforms to our competition legislation. If anything will really assure fair prices for the consumer it is a truly competitive and open marketplace. If the opposition parties, in particular, the NDP, really want to see fair prices in the marketplace, then I challenge them to give quick passage to the competition bill when it is brought forward in a few days. It is significant, Mr. Speaker, that no opposition party has approached the government to co-operate on the passage of the competition legislation which would, among other things, move it from a criminal type legislation to civil legislation. This would allow us to proceed with a great deal more flexibility than the present law, and to outlaw and convict on many practices which lead to higher prices and inferior products in the marketplace. (CD, 27 February 1979, p. 3651.)⁵²

Mr. Symes, the NDP member for Sault Ste. Marie, argued that it was the lack of competition in Canada that was responsible for rising prices. He advanced what has been called the 'administered prices' view of inflation.

My argument is that companies today are able to manipulate prices upwards because our supposed free enterprise or competitive system in reality is no longer working. We do not have effective competition to hold down prices in Canada today. What we do have is a state of oligopolies or near monopolies. We have a few large companies controlling their particular sector of the economy. When they are able to control it through supply, they are able to control it through price. We have some 200,000 corporations in Canada, but a mere 500 of them accounted for 51 per cent of the sales, 59 per cent of the assets, and 63 per cent of the profits. Can anyone tell me we have effective competition in our economy when that kind of situation occurs? (CD, 27 February 1979, pp. 3653-54.)

He went on to describe the high level of concentration in many Canadian industries and to endorse Professor Galbraith's idea that government controls are necessary in that part of the economy dominated by large enterprises.

Since the empirical evidence of a connection between inflation and competition policy is fairly thin,⁵³ this short-term objective of competition policy is perhaps mainly an example of the political authority being seen to do something. Certainly the citations from Mackenzie King are consistent with this viewpoint.

It is evident that periods of high inflation have resulted in efforts to introduce new or alter existing competition legislation. In addition, the government has sought to gain support for competition legislation by arguing that it is a useful weapon in 'fighting inflation'. In 1982, however, the process of causation was reversed. The introduction, in July 1982, of the 'six and five program' of 'voluntary' wage and price restraints produced suggestions from firms and business trade associations that the controls program override the application of the *Combines Investigation Act* to price-fixing agreements. The Director of Investigation and Research noted, "no doubt these questions in part stemmed from the past history of the relationship between the Act and government-induced pricing agreements." He referred to the flour-milling case stemming from the price controls in World War II, calls for exemptions by the petroleum industry in 1959 and 1973, and similar calls by industry generally during the life of the Prices and Incomes Commission in 1971. The Director pointed out that he lacks the power to exempt anyone from the Act. He continued:

Furthermore, the Government does not intend that the 6 and 5 targets become minimum price and wage increases. In fact, the object is to make the targets maximum increases, which implies that price increases lower than the targets would be even better from the Government's policy prospective.

Firms do not have to agree among themselves in order to comply with Government's program. Firms should independently arrive at their respective pricing decisions within the 6 and 5 per cent guidelines.⁵⁴

Protecting Small Business

In perhaps only one instance has there been an important short-term change in the stated (if not the actual) direction of Canadian competition policy to foster competitive market processes. The theory underlying competition policy assumes that competitive markets, in the absence of private restraints on trade and certain 'market failures', will work well. In times of crisis, when this does not appear to be the case, the objectives of competition policy can be changed without threatening its long-term aims. In the 1930s, with 'ruinous' and 'cut-throat' competition induced by the Depression, the objectives of the *Combines Investigation Act* in the period from 1935 to 1937 changed noticeably. Two measures were implemented in mid-1935:

- A new provision (s. 498A) was put into the *Criminal Code* to deal with price discrimination and predatory pricing.⁵⁵
- The *Combines Investigation Act* of 1923 was amended and placed under the administration of the Dominion Trade and Industry Commission, which was established by the *Dominion Trade and Industry Commission Act*.⁵⁶

Under the latter legislation, a form of industry self-regulation was to be allowed.⁵⁷ In other words, instead of reinforcing competitive forces, one provision of the competition-policy legislation was designed to prevent the ruin of competitors,⁵⁸ particularly small businesses. The primary motivating factor was the widespread economic distress caused by the Depression.

Both pieces of legislation stemmed from the *Report of the Royal Commission on Price Spreads* that was made public in April 1935. The *Report* recommended, *inter alia*, that a federal trade and industry commission be established with the power to regulate commerce and industry in the public interest. The *Report* also recommended that legislation be introduced to prevent unfair price discrimination and predatory pricing. While the constitutionality of section 498A was upheld,⁵⁹ part of the *Dominion Trade and Industry Commission Act* was held to be *ultra vires* of the federal government.⁶⁰

Preventing Price Discrimination: In Whose Interest?

In reviewing the discussion of the price-discrimination and predatory pricing legislation in 1935, one is struck by the confusion in the minds of the legislators as to what were its objectives. Was section 498A⁶¹ to protect the process of competition?⁶² What was — and is — meant by the term 'unfair competition'?⁶³ Is the object of the section to keep a larger number of (perhaps inefficient) small sellers in business? Or is its purpose simply to prevent the unfair use of monopsonistic power under which large buyers are able to obtain their inputs at prices lower than can be justified by economies of scale in purchasing and in long, stable, production runs?

Mr. Ralston, M.P. for Shelburne-Yarmouth, argued that section 498A would harass businessmen, by making law evaders of them, and would not benefit the consumer.

I say on the construction of the act itself it is nothing less than a snare and a delusion so far as the mercantile people of this country are concerned, and nothing less than a sham and mockery so far as the relief of the consumer is concerned. There is nothing real in it. People can readily evade the law; anyone can

read it and see that he can easily get around a section like this. . . . (CD, 10 June 1935, p. 3479.)

He also criticized the proposed law for preventing "an honest trader from meeting competition and [because it] makes no allowance for savings in sales costs on account of selling a large volume. . . ." (CD, 10 June 1935, p. 3479.)

Mr. Ilsley,⁶⁴ the Liberal member for Hants-Kings, who had been a member of the Royal Commission on Price Spreads, thought the objective of the law was to prevent the elimination of competition:

I do not know with certainty what was in the minds of my fellow commissioners, but I can say what was in my own mind in coming to the conclusion that discriminatory rebates, discounts and allowances⁶⁵ are for the most part injurious to the economic life of the country. It was this, and this only: that the tendency of such discriminatory rebates, discounts and allowances is to eliminate competition. (CD, 10 June 1935, p. 3487.)

He went on to argue that "the immense buying power" of department stores⁶⁶ and chain stores had the "inevitable effect" of driving out of the market the independent competitors of the large purchaser. As such, this buying power "lessens competition" and in time "results in something approaching monopoly, or quasi-monopoly." By preventing the elimination of competition, the legislation benefits the consumer, Mr. Ilsley asserted. (CD, 10 June 1935, p. 3488.)

Mr. Stevens (Vancouver-Centre), who had been the original Chairman of the Royal Commission on Price Spreads, argued that price discrimination was "unfair" because it was inequitable between competitors and because it "bore down upon the wage earners. . . . we know that resulted in the sweatshops; [large, powerful firms] bore down upon the primary producer, or worked back to the primary producer who carried the load, and they conferred no great benefits upon the consumer. There you have the people about whom parliament is concerned." (CD, 10 June 1935, p. 3490.) Mr. Stevens apparently recognized the difference between pecuniary economies of scale resulting from market power and social economies of scale resulting from increased efficiency in the utilization of real resources. On this point he also quoted from the *Report* of the Royal Commission on Price Spreads as follows: "Unfair price discrimination, or any other similarly unfair business practice, permits the survival of the powerful, rather than of the efficient. The federal trade and industry commission should be given the duty

and power of prohibiting such unfair trade practices." (CD, 10 June 1935, p. 3491.) The *Report* recommended that "discounts, free deals and allowances" be made available to all competitors "on the same terms". It did not object to such discounts if they are "related to any measurable service rendered, or economy effected". (As quoted by Stevens, CD, 10 June 1935, p. 3494.)

Mr. Young, the M.P. for Weyburn, Saskatchewan, a member of the Royal Commission who dissented from the *Report*, thought the problem lay in the Depression itself, which reduced consumers' incomes, and which, in turn, put pressure on retailers' prices. (CD, 10 June 1935, pp. 3494-95.) He concluded that the legislation (s. 498A) was undesirable, for "When we proceed to legislate against the forcing down of those prices we legislate for conditions which will perpetuate the depression instead of relieving it." (*Ibid.*, p. 3495.) In his articulate dissent from the Royal Commission's *Report*, Mr. Young challenged the meaning of 'cut-throat competition':

Any proposal to empower a commission to modify "cut-throat competition" and thereafter regulate industries that indulge in it, should be condemned. Who will define "cut-throat competition"? Any competition that a man cannot meet is "cut-throat" to him. The only way to prevent such competition is to resort to price-fixing, and price-fixing means a further sacrifice of the general interest to the interest of a particular group. (Canada, 1935, p. 306.)

He went on to state what he thought should be the correct perspective the government should take in respect to competition policy:

The only interest that is not a class interest is the consumer interest. The only legislation that is not class legislation is legislation in the interests of the consumer.⁶⁷ In seeking the remedy for our economic ills, we should always keep the consumer's interest uppermost in our minds for "the consumer's interest is the interest of the human race." (Canada, 1935, p. 307.)

The legislation dealing with price discrimination and predatory pricing has been little used.⁶⁸ (Gorecki and Stanbury, 1979a; Dunlop, 1979.) Perhaps for this reason, it has occasioned little debate since 1935. This is in sharp contrast to its American counterpart, the *Robinson-Patman Act* of 1936.⁶⁹

The Liberals' introduction of amendments to the *Combines In-*

vestigation Act in 1937 gave R.B. Bennett, then Leader of the Opposition, an opportunity to defend the Trade and Industry Commission he had set up in 1935. As he saw it, the Commission would have been effective against unfair competition.⁷⁰ He said:

...as business has progressed the main complaint today is against unfair competition. This is one of the matters engaging the attention of economists everywhere. . . . We have to maintain a decent standard of living and by the supervision now provided by [the Dominion Trade and Industry Commission] . . . we have endeavoured to prevent what might be called cut-throat competition which might result in the creation of a monopoly far worse than any possible combine. (CD, 1 April 1937, p. 2425.)

Even the Leader of the socialist CCF party, Mr. Woodsworth, allowed that, "if the competitive system is a good thing, we must in some way seek to avoid unfair competition." (CD, 1 April 1937, p. 2430.)

The problem is that, as a practical matter, it is very difficult to distinguish 'unfair competition' from the normal price competition that characterizes markets in which sellers have no market power. The difficulty is greater when an industry is in disequilibrium because, for example, of excess capacity or of technological or organizational innovation. Under such circumstances, the less efficient firms will go to the wall.

Resale Price Maintenance: To Protect Small Business?

Resale price maintenance (RPM) (called 'price maintenance' since 1976), usually effected through a supplier's refusal to deal with a price-cutting retailer, had been a widespread restrictive trade practice in Canada since at least the turn of the century.⁷¹ RPM and refusal to deal were made *per se* criminal offences in December 1951, less than three months after the MacQuarrie Committee's *Interim Report on Resale Price Maintenance* was released.

Fifteen years later, Mr. Justice O'Sullivan of the Manitoba Court of Appeal, in *R. v. Kito*, argued that the purpose of the prohibition of RPM was to protect small businesses:

In my opinion, the mischief aimed at by section 38 of the Combines Investigation Act was the practice of large corpora-

tions, with monopolistic or near monopolistic powers, artificially keeping retail prices high by coercing independent retailers into fixing prices and by refusing to supply such independent retailers if they did not maintain the suggested list price of products. Before 1951, for instance, a retail gasoline station which undercut the suggested list price of gasoline was in danger of having its supply cut off as a punishment. I believe that Parliament wanted to protect the small retailer from undue pressure from large wholesalers, distributors and manufacturers. Parliament wanted to protect the weak against the strong, though it enacted words which catch the weak as well as the strong.⁷²

With respect, the learned judge is too sweeping in his view of the role of the small retailer in RPM. More frequently, it is pressure from competitors of the would-be price-cutting retailer, who put pressure on the wholesaler or manufacturer to put pressure, in turn, on the price cutter by refusal to deal, that causes the manufacturer to adopt a policy of price maintenance. It is not unknown for large retailers (e.g., a full-service department store) to be the one exerting pressure on the manufacturer to 'cut off' the price-cutting retailer (who may be either a large or a smaller firm).⁷³ Frequently, however, the pressure on manufacturers comes from groups of small retailers. The classic case here is that of the Proprietary Articles Trade Association, which was active in the 1920s.⁷⁴

In our view, it is incorrect to ascribe the introduction of the price-maintenance provisions in 1951 to a desire of Parliament to use competition policy to protect the interests of small business. The proximate cause of the RPM section was the highly regarded MacQuarrie Committee report in 1951 and the high rate of inflation being experienced at the time. Besides, this particular restraint of trade had a long history in Canada and has very little to recommend in its defence. (Skeoch, 1966b.)⁷⁵

Preserving the Free Enterprise System

In the 1950s, perhaps as a reflection of the Cold War, competition policy was taken to have yet another objective: that of preserving the free enterprise system from the possibilities of direct government regulation, public ownership or some form of corporatism. The Minister of Justice, the Honourable Stuart Garson, in a speech to the American Marketing Association in 1955, put the issue this way:

In an authoritarian country like Russia the state controls production, distribution and prices. In socialist countries the government as a deliberate policy intervenes in and in other cases supervises, a wide range of business undertakings. Canada, on the other hand, as a free enterprise country, holds that the economic advantages and political rights of the individual may best be promoted by leaving production, distribution and prices, to the greatest degree possible, to the control of the free competition of individual citizens and corporations.

A primary purpose therefore of the Canadian anti-combines legislation is to maintain an efficient system of free competition and free enterprise — to keep free enterprise from falling under the private control of combines on the one hand or of government regulation and control on the other. The two kinds of control are closely related; for in a democratic country like Canada, a substantial measure of private control would inevitably lead to strong demands for public control. (Garson, 1955a, p. 8.)

Mr. Garson also emphasized that preserving free enterprise was not merely a philosophical question. Canadians, he said, believe in a free enterprise system because "such a system, sparked by private initiative and competition, will yield the highest possible standards of living in the country in which it is practised. It is an historical fact that it is the free enterprise countries that have always had the highest standard of living." (Garson, 1955a, pp. 10–11.) Mr. Garson continued, "The anti-combines legislation provides in effect that enterprise shall remain competitive in order that it may remain free."

This theme was repeated in most of the Minister's speeches on competition policy.⁷⁶ Mr. Garson and his Director of Investigation and Research both emphasized that competition was not a self-sustaining process. Businessmen, individually or in concert, recognized the benefits of various restraints of trade, and would seek to require competition for others while promoting monopoly for themselves. If private restraints on trade went unchecked, they argued, the inevitable result would be some form of government intervention. In a sense, free enterprise had to be saved from itself. Over a decade earlier, this view had been expressed by F.A. McGregor (1944, p. 10), the Commissioner responsible for the administration of the competition legislation: "If the business men of the country want a government controlled economy in Canada there is no surer way of stimulating public demand for it than by stifling

competition and thereby proving that a competitive system is unworkable."

The Progressive Conservatives came to power in 1957, and E. Davie Fulton became Minister of Justice and therefore the Minister responsible for the administration and enforcement of the competition legislation. In a speech given in May 1959, Mr. Fulton (1959a) emphasized that the Diefenbaker government intended to retain in the legislation⁷⁷ the following "principle and purposes":

1. By maintaining competition, to bring about the most effective allocation of resources and the highest possible standard of living;
2. To restrain various economic injustices among individuals;
3. To keep government out of business to the greatest degree possible and thereby help in maintaining a free enterprise economy with maximum economic and social or political freedom for the individual.

With respect to the third purpose, Mr. Fulton (1959a, p. 13) argued that "nothing is so much calculated to arouse demand for direct government supervision than the knowledge or suspicion that a trade or industry, through combination or monopoly power, is fixing prices or other conditions of production or trade according to procedures in which the consumer has no representation." He went on to state: "By preventing combinations and undesirable concentrations, then, and by putting down certain other practices which involve economic injustices, the anti-combines legislation is the instrument for maintaining general interest in a free enterprise economy and for keeping the economy one of free enterprise."⁷⁸

In a speech made shortly after the Conservative government had introduced a series of amendments to the *Combines Investigation Act*, Mr. Fulton (1959b, p. 3) emphasized the theme that the purpose of the legislation was "to preserve and stimulate competition" as a means to a larger end. He asserted that a "free enterprise system, depending on individual incentive spurred by competition, is the system that will yield the highest possible material standards of living and the greatest possible degree of political, economic and social freedom for the individual." He also asserted that, "since there is a very close link between economic freedom, and social and political freedom, we believe that the latter freedoms are enhanced with the former." In the same speech, Mr. Fulton also emphasized "the necessity of ground rules for competition" because, "The very force of the competitive urge tends toward a reduction of competition,

combinations, mergers, monopolies and various other unfair trade practices including deceptive advertising being the instruments of such destruction. For its preservation it requires the enforcement, by a central authority, of certain ground rules."⁷⁹

Although the stated primary objective of Bill C-256, introduced in 1971, was the promotion of economic efficiency, the Minister of Consumer and Corporate Affairs also reiterated the argument that competition policy would help preserve the free enterprise system from greater government intervention:

I don't want to see socialism in Canada, and I know you don't. And I suggest also that none of us would consider it acceptable in Canada to have business activities stringently regulated by government. We are confident, and the Competition Act is an affirmation of our confidence, that effective competition in a free enterprise economy can bring about the efficiencies and the restructuring of our industries that will enable Canada to compete internationally. (Basford, 1971a, p. 7.)

A decade later, a similar point was made by one of his successors. In a speech to a *Financial Post* conference, André Ouellet (1981d, p. 7) listed as one of the three objectives of competition policy — in addition to efficiency and preventing abuses of market power — the following: "to ensure markets perform their basic function of allocating resources, thereby reducing the need for direct government regulation." Earlier in his speech, Mr. Ouellet (*ibid.*, p. 6) emphasized that the reform of the legislation was long overdue and that "the status quo is not an option to be considered." He then argued that "if Canadian business fails to show that it is serious about responding to the public's concern, the public will demand far more." He was referring to the results of a survey commissioned by the government, which indicated that "three out of four Canadians believe corporate concentration is an important and growing concern affecting the performance of the Canadian economy." Mr. Ouellet (*ibid.*, p. 6) went on to say, "One does not need tarot cards or a crystal ball to see that the only alternative to stronger competition laws is increased demand for government intervention and control. In short, the choice is between competition reform now or increased government regulation later." The Minister (*ibid.*, p. 4) noted that while a majority of Canadians believe the answer to corporate concentration lies in "more and better competition," a "sizeable minority would favour increased government regulation as the most appropriate means for protecting them against abuses."

The willingness of Canadian governments to regulate is manifest.⁸⁰ While Americans have moved in recent years to dismantle in whole or in part quite a number of schemes of direct regulation, governments in Canada have shown little interest in moving in the same direction.⁸¹

Preventing the Concentration of Economic Power

One theme that is important in the creation and evolution of U.S. antitrust policy has been all but absent in the more than ninety-year history of Canadian competition policy: a concern with large aggregations of economic, and perhaps political, power, in a few private hands. For example, with the passage of the *Cellar-Kefauver Act* of 1950, which amended the *Clayton Act's* merger provisions, we find Americans arguing that there will be a reaction to vast economic power resting in a small number of business enterprises. Government, at the behest of the people, will move to curb such power by direct intervention. The result of such intervention, it is argued, will be nationalization and then Socialism and even the creation of a Facist state.

As we have just described, a variant of this argument can be found in Canada in terms of 'preserving the free enterprise system'. We emphasize, however, that in the Canadian version it is argued that the widespread existence of restraints of trade generally, for example, cartels, rather than the concentration of economic power, through mergers, will result in demands for government regulation, ownership or a form of corporatism.⁸²

During the Congressional debate in 1949 on his proposed new merger legislation, Representative Cellar pointed to the connection among industrial concentration, cartels and the rise of Hitler in Germany. He quoted Walter Lippman, who argued that concentrated economic power "will never for long be allowed to rest in private hands, and those who do not wish to take the road to the politically administered economy of socialism, must be prepared to take the steps back toward the restoration of the market economy of private competitive enterprise."⁸³ The other co-sponsor of the legislation, Senator Kefauver, argued:

Local economic independence cannot be preserved in the face of consolidations such as we have had during the past few years. The control of American business is steadily being transferred, I am sorry to have to say, from local communities to a few large

cities in which central managers decide the policies and the fate of the far-flung enterprises they control. Millions of people depend helplessly on their judgment. Through monopolistic mergers the people are losing power to direct their own economic welfare. When they lose the power to direct their economic welfare they also lose the means to direct their political future A point is eventually reached, and we are rapidly reaching that point in this country, where the public steps in to take over when concentration and monopoly gain too much power. The taking over by the public through its government always follows one or two methods and has one or two political results. It either results in a Fascist state or the nationalization of industries and thereafter a Socialist or Communist state. Most businessmen realize this inevitable result. Certain monopolistic interests are being very short-sighted in not appreciating the plight to which they are forcing their Government.⁸⁴

Derek Bok (1960) points out that there was widespread agreement for the position advanced by the two legislators. The *Cellar-Kefauver Act* to amend the *Clayton Act* was passed in 1950. The U.S. Supreme Court relied heavily on evidence of "Congressional intent" in deciding the famous *Brown Shoe* case over a decade later.⁸⁵

Richard Hofstadter, an influential political scientist, has argued that it is a widespread concern about the dangers of excessive market power rather than economists' advocacy of efficiency that has been the basis of public support for antitrust policy in the United States. He states:

What makes it possible to institutionalize antitrust activities . . . is not a consensus among economists as to its utility in enhancing economic efficiency, but a rough consensus in society at large as to its value in curbing the dangers of excessive market power. As in the beginning, it is based on a political and moral judgment rather than the outcome of economic measurement or even distinctively economic criteria. (Hofstadter, 1964, p. 149.)

Professor Louis Schwartz (1979) provides additional evidence of Americans' concern with the concentration of economic power in other than the antitrust statutes. To Robert Pitofsky's (1979) list of legitimate non-economic objectives he adds 'justice' — in the sense of fair and equal treatment of persons in like situations

These is no such broadly based support for competition-policy

legislation in Canada. Unlike American antitrust policy, Canada's has no populist underpinnings. The present Director of Investigation and Research states:

An important historical string in the U.S. antitrust policy bow is missing from the conceptual framework for competition policy in Canada and has the effect of creating policy boundaries that are significantly narrower in Canada than in the United States.

The reference here is to the inclusion of the diffusion of economic power as an integral plank in the platform of competition policy objectives. It is true that a perception of the need to prevent excessive accumulation of economic power served initially as a major element in the ideological basis for antitrust policy in both countries.

However, whereas the notion that more decision units are preferable to [fewer] has maintained more or less continuing priority in the United States, such an objective has not survived the passage of time in Canada. As a result, the rationale for avoiding the abuse of massive power, with its political and social implications, by preventing its excessive accumulation, does not seem to be present in Canada. (Hunter, 1982, pp. 11-12.)

In contrast, the U.S. Supreme Court has described the *Sherman Act* as a basic charter of economic freedom.⁸⁶ In the *Topco* case,⁸⁷ a decade ago, the antitrust laws were compared to the *Magna Carta* and the *Bill of Rights*.

With the merger boom in Canada in the late 1970s and early 1980s,⁸⁸ the Minister of Consumer and Corporate Affairs began to express his concern about the implications of the large number of large mergers (many of which were conglomerate mergers). In a speech to his provincial colleagues in October 1980, Mr. Ouellet stressed the role of competition policy in deterring greater concentration of economic power; in keeping prices down and expanding consumer choice; and in ensuring the efficient allocation of resources. The Minister was particularly concerned about "the wave of mergers" that he said was having "such a considerable impact on the Canadian industrial structure that if it is not controlled, its negative effects on competition will ultimately annihilate the effort of the Government to promote competition." (Ouellet, 1980, p.6.)

Mr. Ouellet (1980, p. 7) saw in mergers a danger that with a growing concentration of economic and political power, "a community of interests develops between the companies . . . and the Government . . ." The implication is that market forces will be sup-

planted by corporatism. In a number of speeches made in 1980 and 1981 the Minister emphasized that following the *K.C. Irving*⁸⁹ decision by the Supreme Court of Canada in 1976, the merger provisions were virtually unenforceable.⁹⁰

The government has cause for concern as the increase in aggregate concentration recorded in Table 5-1 suggests. These figures do not include the effects of the large number of large mergers in 1979-81. Even so, R.S. Khemani (1981, p. 8) reports that between 1975 and 1978, when merger activity was lower than between 1979 and mid-1981, the twenty-five largest non-financial enterprises increased their assets by 26 per cent per year by means of acquisitions.

Table 5-1: *Percentage of Assets and of Manufacturing Shipments Accounted for by the Largest 25, 50 and 100 Non-Financial Enterprises in Canada, 1965, 1973, 1978*

	1965*	1973**	1978
● Largest 25 enterprises			
● assets	23.8%	25.2%	31.1%
● mfg. shipments	24.5%	27.1%	29.2%
● Largest 50 enterprises			
● assets	30.6%	32.4%	38.0%
● mfg. shipments	33.3%	37.0%	38.7%
● Largest 100 enterprises			
● assets	38.6%	40.1%	48.6%
● mfg. shipments	43.9%	48.2%	50.4%

* 1968 for mfg. shipments

** 1974 for mfg. shipments

Source: Khemani (1981, p. 3).

W.T. Stanbury and Susan Burns (1982, pp. 190-91) describe the latest merger boom as follows:

Between 1977 and 1981 the average number of mergers was over 430 per year. This compares with an annual average of 378 in the period 1970-74 and 192 in the period 1960-64. But of particular concern is the large number of *large* mergers/takeovers that occurred. For example, between 1978 and 1981 there were 55 takeovers of companies in Canada in which the transaction price exceeded \$100 million. In 20 of these takeovers the value of the transaction exceeded \$400 million.

The National Energy Program was a powerful stimulus to the

takeover of foreign-owned petroleum enterprises by Canadians. For example, 23 of the 55 takeovers referred to above were of the petroleum industry. At the same time, however, a major part of the takeover activity was generated by eight large conglomerates, seven of which are effectively controlled by a single family. The eight are: the Thomson family interests; Olympia and York (the Reichmans); the Ravelston group (Conrad and Montegu Black); Power Corporation (Paul Desmarais); George Weston Ltd.; Cemp Investments (Bronfman family); Edper Equities (Edward and Peter Bronfman); and Canadian Pacific Ltd. While definitive figures are not available, between 1975 and 1981 these eight conglomerates probably tripled their assets, in large part due to takeovers. Overall, between 1975 and 1980, one-third of all mergers in Canada were of the conglomerate type. Horizontal mergers, those most threatening to the extent of competition in individual markets, accounted for about 56 per cent of the total during the same period.

Despite this record, not one merger was challenged in court.

Moreover, the aggregate level of concentration in Canada is substantially higher than in the United States; that is, Canada's top 100 non-financial enterprises had 48.6 per cent of all corporate assets in 1978, while the top 100 in the United States had 30.6 per cent in 1975. (Francis, 1981, p. 56.) This point was developed by the Deputy Minister of Consumer and Corporate Affairs in a speech in 1982. He stated:

The degree of concentration in many industries is higher in Canada than in the United States and Europe. It's so widespread, that, in one industry after another, there are only four producers . . . often fewer. The pace of mergers and takeovers in Canada since the end of the war has made such concentration inevitable. From 1945 to 1949, there were fewer than 60 mergers a year. In 1979, there were more than 500 mergers or takeovers. Since 1975, the 100 largest Canadian companies have been involved in more than 150 mergers and takeovers. These 100 companies now control over half the assets of all Canadian corporations. That is correct: *the 100 largest corporations control more than half the business assets of our country. . . .*

Since 1978, more than 50 companies have disappeared from the Toronto Stock Exchange Index of 300 industrial stocks. These companies, once owned by investors, large and small, are

now controlled by a few corporations. (Post, 1982, pp. 6-7. Emphasis in the original.)

Even in the National Energy Program (NEP) introduced with the October 1980 Budget, the Minister of Energy, Mines and Resources expressed concern about the possibility of greater concentration, even though it might now be in Canadian hands.

While the Government of Canada is determined to increase Canadian ownership and control, it does not wish the result to be increased concentration of power in the hands of a few large Canadian companies. Competition is the lifeblood of the industry, and the consumer's best protection. A concentrated Canadian industry is an unsatisfactory replacement for a concentrated foreign-owned industry. The intent of the Program is to *increase* the number of Canadian participants. (Canada, 1980, p. 51. Emphasis in original.)

The substantial number of take-overs following the announcement of the NEP appears to indicate a shift of the oil and gas industry into Canadian hands.⁹¹ It remains to be seen if owners residing on Bay Street behave much differently from those headquartered on Wall Street.⁹²

Ensuring Fairness and Honesty in the Market-place

Somewhat related to the use of competition policy to protect or enhance the position of small business is the idea that the policy is "a corner-stone of [the government's] efforts to ensure a fair and equitable market system in Canada." (Ouellet, 1974, p. 9.) This objective of competition policy was emphasized at the time the Stage I amendments were in process (November 1973 to December 1975). An important component of these amendments consisted of changes in the misleading-advertising provisions originally put into the *Combines Investigation Act* in 1960 (concerning misleading price advertising) and in mid-1969. The latter dealt with misleading or deceptive statements of fact or misleading statements or guarantees of performance not based on a proper test.⁹³ The Stage I amendments introduced a number of new deceptive practices offences: misleading warranties or guarantees of performance; misleading testimonials; 'bait and switch' advertising; multiple ticketing; misleading promotional contests; and sale above advertised prices.⁹⁴

The purpose of these amendments, the Minister of Consumer and Corporate Affairs said, was to establish the "rules of the game" for the private sector to conduct business "in an orderly fashion". In addition, the requirements for disclosure and fair dealing were designed to "ensure there is a reasonable balance of power between various participants in the market place." (Ouellet, 1975, p. 2.) Mr. Ouellet (*ibid.*) continued:

Clearly, a great deal of suspicion and distrust has grown up over the past few years between consumers and those who produce and sell the goods. I believe one of the root causes of this friction has been the rapid growth in the size and power of enterprise in relation to the individual citizen. Our programs of consumer legislation and consumer information are vitally important to redressing this balance of power and to restoring public confidence in the effectiveness of the market system.

The Minister described Consumer and Corporate Affairs as a "public interest department" seeking to "ensure that there is a fair and effective market system for all."⁹⁵ Mr. Ouellet's predecessor, Mr. Gray (1974, p. 1) had argued that the Stage I amendments were aimed "at bringing important benefits to consumers and to small businessmen"

We note that the preamble to Bill C-256, introduced in 1971, viewed honesty and fair dealing in functional terms, that is, as methods that would improve efficiency and ensure that the benefits of the market system were distributed to the public. The preamble stated, in part, "And Whereas it is necessary and desirable, in the interest of efficiency of production and distribution and the transmission of the benefits thereof to the public, to promote honest and fair dealing in the market . . ." (p. 2).

Although, as we have seen above, the primary objective embodied in Bill C-256 was efficiency, the Minister, Mr. Basford, also noted the components particularly aimed at promoting "fair and honest dealing". In a speech to the Canadian Better Business Bureau, he said that the Bureau shared his conviction, ". . . that to the extent we can eliminate unfair, unethical and dishonest dealing from the marketplace, public confidence and trust will be restored, the business community will cease to be dragged into unjustified disrepute by the actions of those very few, and our market economy will be freed to realize its full potential." (Basford, 1971d, p. 4.)

This argument is similar to the one used by Mr. Garson, the Minister of Justice in the 1950s, that competition policy is designed,

in effect, 'to save capitalism from itself' by curbing some of its unattractive restrictive or deceptive practices. Preserving the free enterprise system from either government ownership, government regulation or corporatism requires that the state establish rules of the game that inspire public confidence. Besides, the system is worth preserving because "Canada's present economic strength, and the high standard of living enjoyed by our people have been brought about by a dynamic market economy." (Basford, 1971d, p. 4.)

Competition Policy as Political Compromise

Competition policy can be seen as a form of government regulation, albeit against the actions of private firms seeking to impose restraints of trade on competitive markets, effecting a compromise between the major business interest groups on the one hand, and farmers, consumers and small businessmen on the other. Put too strongly perhaps, in this view there are no substantive objectives for competition policy. Rather, the objective of the policy is to ameliorate economic conflict among contending interests.⁵⁰ Business as an interest group, it is argued, prefers industry 'self-regulation' with the fig-leaf protection of an ineffective competition policy useful for symbolic reassurance by politicians. On the other hand, consumers are more interested in an effective competition policy that achieves optimum resource allocation thereby maximizing their welfare in aggregate terms. Hence, depending upon the relative strength of each interest, the legislation, as well as its administration and enforcement, will reflect the objectives of the group that is politically more effective.

In general terms, G. Rosenbluth and H.G. Thorburn see the policy as designed to effect a political compromise:

The Combines Investigation Act furnishes an excellent example of the kind of political tight-rope walking that is necessary in a modern industrial democracy. Governments try hard to avoid antagonizing large blocks of voters, and at the same time to maintain the support of substantial business interests, not only because political campaigns are expensive, but also because, in a multitude of ways, the environment in which government operates is influenced by the actions and attitudes of the major business groups. Very often, particularly in non-economic areas, there is no conflict between these objectives, and, even in the economic field, important aspects of govern-

ment policy may not involve conflict. Everybody favours prosperity. Where conflict arises between the interests of these two elements the government is compelled to work out a "compromise"; the effect of such a policy on the public interest can only be ascertained by the study of particular examples.

Anti-combines policy is an instance of this kind of conflict. One has only to read the Combines Investigation Act (in any of its versions since 1923) to realize that it is bound to arouse the opposition of major business groups, while it will appeal to the mass of farmers and employees and to individual businessmen, particularly small businessmen, who are the victims of monopolistic restrictions.

In a period of general prosperity, the damage to the public interest arising from monopolistic structures and practices is generalized and not felt acutely by any one section of the population. The economic inefficiencies in the production and allocation of goods introduced by monopoly reduce the real national output, but other forces are pushing it up. The transfer of income to the monopolistic groups is hidden by the general rise in incomes. It follows that there is no significant political group that has any strong interest in checking the effectiveness with which combines legislation is enforced. Political leaders find, therefore, that the interest of the mass of voters in combines legislation is satisfied by action which is symbolic and dramatic, though it may not be particularly effective.

In such a situation, the compromise between the requirements of mass support and the requirements of business support is likely to take the form of limited enforcement activity with the emphasis on a few flagrant cases of price agreements which will produce spectacular judicial decisions.⁹⁷ This leaves the activities of the leading corporations substantially untouched.

There is one qualification, however. When general prosperity is accompanied by inflation, the attention of the public turns to the determinants of prices at the retail level. In such a situation, a government may attempt to reduce public criticism of its policies by directing the attention of the public to monopolistic arrangements, particularly at the retail level. (Rosenbluth and Thorburn, 1963, pp. 96-97.)

In other words, the competition policy administered in Canada does

not reflect a set of coherent objectives, but rather a mixture of several competing objectives held by contending interests.⁹⁸

Rosenbluth and Thorburn (1963, pp. 29–30) argue that there are two fundamentally different views of the proper role of competition policy in a modern economy that underlie the political compromise. The first they label the “cops and robbers” approach, according to which,

... the major function of the anti-combines machinery is to prepare the prosecution and punishment of a small minority among businessmen who abuse positions of economic power or engage in unfair practices. These men are criminals, and the criminal law is the basic tool for dealing with them. (Rosenbluth and Thorburn, 1963, pp. 29–30.)

They assert, perhaps surprisingly, that “evidently influential business groups hold this view” But businessmen also think it is unfair to stigmatize as criminal behaviour what they consider to be “normal trade practices”. (It is not surprising, therefore, that the proposals in 1969, 1971, 1977 and 1981 to move certain matters [e.g., mergers and monopolization] from the criminal to the civil law met with approval from the business community.) The alternative view of the role of competition holds that:

... the propensity to monopolize, being part and parcel of the propensity to seek maximum profit, is common to all businessmen and not the special characteristic of a criminal minority. This is the meaning of Adam Smith's much-quoted statement that “people of the same trade seldom meet together . . . but the conversation ends in conspiracy against the public or in some contrivance to raise prices.” (Rosenbluth and Thorburn, 1963, p. 30.)

With this view it is accepted that considerable government effort outside the usual realm of competition policy will be necessary to ensure that a competitive environment is maintained. It is also recognized that ‘normal business practices’ such as conscious parallelism can produce undesirable social consequences. Furthermore, attempts to restrain such behaviour are not so much a matter of morality as they are of economic policy. In one sense, the difference lies between the concept of *mala in se* and *mala prohibita* in the criminal law.⁹⁹

On the basis of their survey of the administration and enforcement of competition policy, Rosenbluth and Thorburn (1963, p. 101) conclude that the enforcers have adopted the "cops and robbers" concept: "Combines officers are viewed as a species of specialized policemen who enforce a particular statute by looking for violators, investigating their activities, and bringing them to justice before the courts." As a consequence, they argue, simple (*per se*) cases have predominated, too few of the complex merger and monopoly cases have been prosecuted, the price discrimination section has been underutilized, and research efforts have been inadequate. In drawing these conclusions, Rosenbluth and Thorburn concentrated their analysis on the period from 1952 to 1960. (It should be noted, parenthetically, that the House of Commons Committee to Study Combines Legislation (Canada, 1952) made some of these same criticisms and Parliament made appropriate changes to the Act in 1952.) In our view, their conclusions hold up when viewed over the period from the turn of the century to the early 1960s. Since then, however, there has been plenty of evidence that the enforcement efforts have broadened,¹⁰⁰ and strenuous efforts have been made to reform the policy itself, although the government has not been able to get much-needed, new, civil merger and monopoly legislation enacted.¹⁰¹

Clearly, Rosenbluth and Thorburn hold to the second view of the proper role of competition policy. They advocated an active, policy-oriented, research effort; the use of civil law instead of criminal law in a number of areas; the use of tariff and patent policy to promote competition; and the infusion of the competition-policy perspective into a number of other instruments of public policy.¹⁰²

Certainly the recent efforts to amend the *Combines Investigation Act* provide evidence that the policy, as enacted, amounted to a rough sort of compromise. One of the authors has noted:

Assuming that the Stage II amendments do constitute at least a modest improvement over the existing legislation,¹⁰³ both the business interests which opposed the Competition Act and the Stage I amendments and the government which sought to greatly strengthen Canada's competition legislation can find something in the final result to cheer about. Neither group won a complete victory nor suffered a complete defeat. (Stanbury, 1977a, p. 201.)

Gorecki (1981a), in his study of the effectiveness of the administration and enforcement of competition policy between 1960 and 1975,

suggests numerous changes that can be made to improve the effectiveness of the Act's principal objective: economic efficiency. In particular, the study suggested that in areas where Parliament had discretion — tariff changes and the introduction of changes in the law after various judgments and RTPC reports of the early 1960s concerning mergers — little was actually done. In both cases the business interest would have been hurt. This lends some support to the view of Rosenbluth and Thorburn that competition policy is strong on words, but weak on action.

Unlike Rosenbluth and Thorburn (1963) and Stanbury (1977a), Bert Young (1974) has no hesitation in seeing the legislation as a piece of *class* legislation existing solely for the benefit of the business community. In no uncertain terms, after a brief survey of the history of the *Combines Investigation Act*, Young concludes:

- legislation was only introduced and amended when class conflict threatened the ruling class . . . ;
- the government in power at particular times were more concerned with any detrimental effect the CIA [Combines Investigation Act] may have had on business than in supporting the CIA and the appointed officials who administered the Act . . . ;
- the wording of the CIA throughout its history has given loopholes to corporations which could have been corrected by legislation but was not; . . .
- the CIA has consistently ignored the service industry, particularly financial institutions in Canada and the increasing concentration in this sector. (Young, 1974, p. 73.)

In Young's view, the objective of competition policy is to reduce class conflict while maintaining the power of the 'ruling class'. Competition policy performs a very useful function for business firms, for they are able to point to the *Combines Investigation Act* as evidence of a strong commitment to a competitive social control mechanism for the excesses of business in a capitalist economy.¹⁰⁴ In reality, however, Young argues, lax enforcement and the loopholes in the Act mean that it is a virtual dead letter.

Colin Goff and Charles Reasons (1978, p. 34) offer an analysis of the usefulness of a "conflict interpretation"¹⁰⁵ of the emergence and change of anti-combines legislation in Canada." They conclude that their

. . . historical account of Canada anti-combines legislation has

shown that the federal government has not lived up to the philosophy behind combines legislation. The government may never realistically eliminate all restraint of trade practices and economic concentration in Canada, but an examination of the intentions of governments since 1889 may indicate that their public statements and their undeclared intentions were at opposite ends of the pole. Illegal trade practices have generally proceeded unhindered, despite numerous committee reports which point to serious deficiencies in our system of "free and open enterprise". (Goff and Reasons, 1978, p. 74.)

Why is this so? Goff and Reasons (1978, p. 75) state:

... the lack of relevant measures to maintain competition in the Canadian economy can be seen as the outcome of a long-standing and almost traditional belief held by King and those who followed him that large corporations which control a great portion of the market are basically beneficial to the needs and life chances of the Canadian public. Canadian combines legislation has been the result of the government's close relationships with the business sector.¹⁰⁶

A similar view, based on a detailed analysis of Canada's food policy and the impact of competition policy in the food industries, can be found in Mitchell (1975).¹⁰⁷

It is possible to interpret J.C.H. Jones' (1975) work on the objectives of the Director of Investigation and Research in enforcing the merger provisions as a form of political compromise. In this case, the compromise is between the self-interest of the bureaucrats (taken to be their personal security) and that of the politicians (inaction that reduces the 'flak' from the business community). Jones (*ibid.*, p. 296) defines society's welfare function in this context as a "vigorous program of merger enforcement"¹⁰⁸ that is based on "a belief in the efficacy of competition and the paramouncy [*sic*] of the market." The Director, however, does not pursue the strict power goal of vigorous enforcement, because that would bring him into conflict with his political masters. Rather, Jones (*ibid.*, p. 295) says, he engages in "the intricate process of 'bluffing'", which is more compatible with the "pure security goal".

On balance, Jones (1975, p. 296) concludes, "the maximizing behaviour of the bureaucracy increases social welfare while that of the government [politicians] decreases it." He continues:

The only way it could be improved upon . . . would be for the Branch to declare the interpretation of the Act by the courts and the government's 'positive inaction' as militating against the best interests of the legislation, to declare in other words, the social welfare function (as it appears in the legislation) to be unattainable. This would have at least forced action (a political decision to change or not to change the legislation) one way or the other.

Ideally, this approach implies that the bureaucracy should become a public watchdog. However, this role is politically unpalatable. In addition, the superior technical expertise (in the Weberian sense) of the bureaucracy would always place the party in power at a disadvantage, which makes such independence politically unacceptable and, in a democracy, hardly desirable. (Jones, 1975, p. 296.)

In light of the circumstances surrounding the departure of Robert Bertrand as Director in May 1981,¹⁰⁹ it seems evident that vigorous enforcement, a high public profile and the persistent advocacy of new, tougher legislation can indeed violate the political constraints.¹¹⁰ This was not the first time this had occurred.¹¹¹

One of the problems with the discussions of competition as the product of political compromise is that the various commentators all seem to find evidence consistent with their hypothesis, whether they be Marxist, conventional political scientist and economist, or sociologist. This is likely to be a reflection of two factors. First is the differing background of each commentator and the fact that each focuses on a different facet of the policy. Secondly, the different approaches do not necessarily conflict with one another. In particular, if business interests dominate in the determination of the objectives of competition policy, then this circumstance is likely to be consistent with all of the models discussed above. On the other hand, if the consumer interest dominates, the predictions of the models would be much harder to reconcile. The evidence seems to indicate that business interests dominate public policy relating to competition policy.

Notes

1. Mr. Wallace, Conservative M.P. for West York, moved on 29 February 1888 that the Select Committee be established. He was later made its chairman. The Committee did its work promptly and reported on 16

May. (It heard 63 witnesses in 26 meetings; 40 of the witnesses "were members of combinations themselves." (CD, 8 April 1889, p. 1115.)

2. The first clause was the central one. It read as follows:

Every person who combines, agrees or arranges with any other person, or with any railway, steamship, or steamboat or transportation company

- (a) For granting to any person who is a party to such combination, agreement or arrangement, any facility for the purchase, sale, transportation or supply of any article or commodity which is an object of trade, which facility is, by such combination, agreement or arrangement not to be granted to any other person who is not a party thereto;
- (b) For denying to any person who is not a party to such combination, agreement or arrangement, any facility for any such purchase, sale, transportation or supply, and which, by the provisions thereof, is to be granted to any person who is a party thereto;
- (c) For unreasonably enhancing the market price of any article or commodity which is an object of trade;
- (d) For unduly restraining the traffic in any such article or commodity;
- (e) For limiting, lessening or preventing the production, manufacture, sale or transportation of any such article or commodity;
- (f) For preventing or restricting competition in the production, manufacture, sale or transportation of any such article or commodity — by such combination, agreement or arrangement not to be granted to any other person who is not a party thereto.

3. CD = House of Commons, *Debates*

SD = Senate, *Debates*.

4. The second Wallace bill of 1889 was as follows:

An Act for the Prevention and Suppression of Combinations Formed in Restraint of Trade.

WHEREAS it is expedient to declare the law relating to conspiracies and combinations formed in restraint of trade to provide penalties for the violation of the same: Therefore Her Majesty, by and with the advice and consent of the Senate and the House of Commons of Canada, declares and enacts as follows:

1. Every person who conspires, combines, agrees or arranges with any other person, or with any railway, steamship, steamboat or transportation company, *unlawfully*,
 - (a) To limit the facilities for transporting producing, manufacturing, supplying, storing or dealing in any article

or commodity which may be a subject of trade or commerce; or

- (b) To restrain or injure trade or commerce in relation to any such article or commodity; or
- (c) To prevent, limit, or lessen the manufacture or production of any such article or commodity, or to enhance the price thereof; or
- (d) To prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation or supply of any such article or commodity, or in the price of insurance upon person or property:

Is guilty of a misdemeanor and liable, on conviction, to a penalty not exceeding four thousand dollars and not less than two hundred dollars, or to imprisonment for any term not exceeding two years; and if a corporation, is liable on conviction to a penalty not exceeding ten thousand dollars and not less than one thousand dollars. (Emphasis added.)

Lloyd Reynolds (1940 p. 134) comments that in the session of 1889, "the government showed no enthusiasm for its passage", and opponents had it referred to the Committee on Banking and Commerce, where lobbyists worked successfully to severely weaken the bill.

- 5. Until this work was removed in 1900, the statute was unenforceable.
- 6. Historian Michael Bliss (1973, p. 182) claims that Mr. Wallace knew all along that his second bill would be ineffectual and that he was indulging in "fraudulent political posturing, designed partly to continue to enhance Wallace's popular reputation as the enemy of combines. . . ." The M.P. for Prince Edward Island, Mr. Davies, claimed that Mr. Wallace "got [his second Bill] referred to the Banking and Commerce Committee; and, without discussing it or offering one word in support of it, he introduced a new Bill. . . and brought it before the Committee. . . ." (CD, 22 April 1889, pp. 1439-40.) The new bill, he said, "does not declare that the doing of any act, or the leaving undone of any act, shall of itself constitute a misdemeanor. . . it merely says, if he does anything unlawfully, he will be punished." (*Ibid.*, p. 1440.) For a more sympathetic discussion, see Baggaley (1982, pp. 26-29).
- 7. He was both correct and incorrect in his assertion. The insertion of 'unduly' did have the effect of 'favoring combines', but not because the common law of the time was stricter, as Richard Gosse (1962) points out. With the exception of one year, the word 'unduly', inserted in 1889 by the Senate, has been retained in Canadian law to this day. Ninety years later the Supreme Court of Canada, in *Aetna Insurance* (1977) 34 C.C.C. (2d) 157 and *Atlantic Sugar* (1980) 2 S.C.R. 644, was still grappling with the precise meaning of the word. See Reschenthaler and Stanbury (1981); Cairns (1981b); McFetridge and Wong (1981,

1982); Engelhart (1981). 'Unduly' is the word that sharply distinguishes the Canadian law on conspiracies in restraint of trade (i.e., price fixing, market-sharing agreements) from the American law embodied in s. 1 of the *Sherman Act* of 1890. Section 1 of the *Sherman Act* states: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations, is hereby declared illegal. . . ." In practice, the U.S. courts have declared price fixing, market-sharing agreements, and a number of other types of agreements to be illegal *per se*: see, for example, Areeda and Turner (1980) and Sullivan (1977).

8. The version of the bill as returned to the Commons and passed, albeit reluctantly, by its advocates, was as follows:

1. Every person who conspires, combines, agrees or arranges with any other person, or with any railway, steamship, steamboat or transportation company, *unlawfully*,
 - (a) to *unduly* limit the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article or commodity which may be a subject of trade or commerce; or —
 - (b) to restrain or injure trade or commerce in relation to any such article or commodity; or —
 - (c) to *unduly* prevent, limit, or lessen the manufacture or production of any such article or commodity, or to *unreasonably* enhance the price thereof; or —
 - (d) to *unduly* prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation or supply of any such article or commodity, or in the price of insurance upon person or property.

Is guilty of a misdemeanor and liable, on conviction, to a penalty not exceeding four thousand dollars and not less than two hundred dollars, or to imprisonment for any term not exceeding two years; and if a corporation, is liable on conviction to a penalty not exceeding ten thousand dollars and not less than one thousand dollars. (Quoted in Ball, 1934, pp. 8–9; emphasis added by Ball.)

9. See also Cohen (1938, p. 457.) A number of M.P.'s understood that even compared to Mr. Wallace's second bill, the one returned by the Senate was a weak one. Mr. Mills (Bothwell) said, "It made nothing unlawful that was lawful before, so that in every respect the Bill was absolutely colorless. . . . an amendment by the Senate . . . weakens the law as it stood before. . . ." (CD, 30 April 1889, p. 1689.) Mr. Mulock said, "this very weak measure as it left our House has become weaker still when in the Senate". (*Ibid.*, p. 1689.) Mr. Wallace continued to support the bill and stated: "I have no doubt that the effect of the Bill will be to prevent combinations and that it will prove beneficial

throughout the country." (*Ibid.*, p. 1690.) Mr. Davies argued that the Senate amendments, "so far from declaring what the common law is, introduced an element of doubt and difficulty, and minimised the common law." (*Ibid.*, p. 1690.) The Minister of Justice agreed with him, saying, "It is true, to some extent, the Bill as now amended will be less severe against combinations in restraint of trade than was the common law or the statute regarding conspiracies. The common law, however, was exceedingly severe in these cases. . . ." (CD, 30 April 1889, p. 1690.)

10. A similar misconception was held by distinguished American legislators as the Congressional debates surrounding passage of the *Sherman Act* in mid-1890 attest. See, for example, Walker (1910, pp. 14–15, 33); Bork (1978, p. 20); Thorelli (1955); Stone (1979, pp. 24–25). A summary can be found in Gorecki and Stanbury (1981b).
11. See also Cohen (1938, p. 458).
12. The various attempts are described briefly in Stanbury (1981a). See also Magwood (1981) and Baggaley (1982).
13. A more detailed history is described in Gorecki and Stanbury (1981a) and Baggaley (1982).
14. Carman Baggaley (1982, p. 46) states:

The Senator in question, David Mills, the Minister of Justice, was not responsible for removing the word. Mills did think that the wording of the section was inadequate; however, it is not clear that he thought it should be changed, "those are anomalies in the section which might be corrected, but which I did not think it (worth while) to interfere with. . . . They are a surplusage and, as a matter of art, ought not to prevail." A moment later Mills suggested, "if 'unlawfully' is left in 'unduly' should be struck out" and then, following an interjection by Bowell, he suggested, "The word 'unlawfully' should come out, or the other word." Mills was uncertain about whether any change should be made and about which word should be removed. (At this point the Bill discussed above had only received First Reading.)

It was Senator Power, not Mills as Bliss suggests, who moved that the word "unlawfully" be omitted and Power knew exactly what he was doing. Power, a graduate of Harvard Law School, had been advocating such a change since 1889. In that year, when the Senate first considered the legislation, he had argued, "If we want to make a good and effective Bill we should strike out the word 'unlawfully'." . . . During the debate on the Bill to remove unduly and unreasonably, he argued, "in any case the word 'unlawfully' is unnecessary and objectionable here, and it is better to have it out in any case, and if we can strike out the word 'unduly' also we shall still further improve the law." Power's motion was

accepted and the Bill to amend the *Criminal Code* passed the Senate. (Footnotes omitted.)

15. (1897) 3 Rev. de Jur. 453.
16. *Ibid.*, p. 460.
17. *Ibid.*
18. *Ibid.*, p. 463.
19. See Hudon (1977). The situation is quite different in the United States. There judges commonly pore over Congressional debates to try to discern the intent of legislators in passing specific statutes. An outstanding example is the *Brown Shoe* case, (1962) 370 U.S. 294, which dealt with a merger under s. 7 of the *Clayton Act*, which had been amended in 1950. See also Bok (1960).
20. (1892) A.C. 25.
21. (1905) 9 C.C.C. 505 at p. 511.
22. *Ibid.*, p. 519.
23. *Ibid.*
24. There, Harvey, J. stated:

In 1900 a new section was substituted for section 520, the word "unlawfully" being struck out of the section, leaving it as we now find it in 498. It appears to me Parliament must be deemed to have intended something by the change, i.e., to go beyond the Act of 1889 as simply declaratory of the common law, and that a contention that the word which had been taken out of the section should be read into it again cannot be supported. The fact that the section had been amended the preceding year reinserting the words "unduly" and "unreasonably" which had been removed in an amendment in the year previous to that, emphasized the intention to change it. (1908) 14 C.C.C. 61 at pp. 62-63.

25. In 1910 W.L. Mackenzie King argued that the Act of 1889 was merely declaratory of the common law. King said it created no new offence and established no new penalty. Both statements are incorrect, but the latter one is remarkable because the common law remedy for restraint of trade was simply to declare the private contract void (i.e., unenforceable) on the grounds of public policy. See the discussion in Gorecki and Stanbury (1981b).
26. (1912) 46 S.C.R. 1 at p. 11. About the Act of 1889, Davies, J. took the same view as Mr. Wallace and the Minister of Justice, Sir John Thompson.

The history of this legislation, however, throws little light upon its proper interpretation, but it confirms me in my opinion that Parliament was not so much creating a new criminal offence as it was defining an existing though unwritten one and attaching to it

punishments by fine and imprisonment. (1912) 46 S.C.R. 1 at p. 12.

27. (1912) 46 S.C.R. 1 at p. 16.

28. (1894) A.C. 535.

29. (1912) 46 S.C.R. 1 at pp. 17-18.

30. Mr. Justice Idington offers the following explanation of his view:

Not only had the expansion of trade and commerce in England by the year 1889 rendered the lines laid down in many old cases somewhat unfitted to follow under new conditions then existing in England, but their applicability to Canada and its conditions seemed still more grotesque as a foundation and defined field of operation for a criminal statute such as we have to interpret and construe.

But it may be asked, why should it proceed by prefacing the whole with the word "unlawfully"? And further asked was it not merely the purpose to fix penalties for doing that which was already unlawful? It is not clear that the draftsman erred in using both words, "unlawfully" and "unduly", in the connection in which they were placed. Surely if a thing were unlawful it must be undue. It was never intended to declare that an undue measure of unlawfulness was the thing to become indictable.

Parliament set out, as the recital shows, to declare what was to be held unlawful and evidently intended to declare that the unduly doing that which was referred to in sub-section (d) amongst others, were unlawful things, and must be prohibited.

And to make this clear the Act was in 1899, inadvertently, as I think, amended by striking out the word "unduly" and thus leaving "unlawfully" the test. Next session, on attention being drawn to the inadvertence, the word "unlawfully" was stricken out and the word "unduly" restored. The Act as thus finally amended is what is pleaded here. (1912) 46 S.C.R. 1 at pp. 17-18.

Then Idington, J., drew the following conclusion:

This legislative history demonstrates as clearly as possible that it was not against something already unlawful, but the unduly doing that then lawful so far as the criminal law extended that the amended statute of 1900 was aimed at. (1912) 46 S.C.R. 1 at p. 18.

Mr. Justice Idington argued that Canadian judges could go beyond the "plain meaning" of the words in the statute in seeking to understand its meaning. He said:

... we are not debarred from looking at the legal history of either unreasonable restraint of trade as interpreted by the courts, or

anything else within the common knowledge of mankind, which, in order to effectuate the purpose of the legislature, may help us to find out, if we can, what meaning we must attach to the word "unduly" in sub-section (d) of section 498 of the code as it stood in 1905 and 1906. (1912) 46 S.C.R. 1 at p. 18.

31. (1917) 54 S.C.R. 381.
32. (1917) 39 O.L.R. 495.
33. (1711) 1 P. Wms. 181.
34. 1894 A.C. 535.
35. 1913 A.C. 781.
36. 1914 A.C. 461.
37. 1911 221 U.S. 1.
38. The language of this statute appears to have influenced the *Combines Investigation Act* of 1910. It made it an offence to enter into an agreement "with intent to restrain trade or commerce to the detriment of the public" where the public was defined to include "producers, workers and consumers".
39. *Dominion Supply v. Robertson* (1917) 39 O.L.R. 495 at p. 508.
40. *Ibid.*, p. 511. Clute J. (at p. 510) quotes Lord Parker in *Adelaide Steamship*, (1913) A.C. 781 at p. 797, on the distinction between a contract that is an offence at common law and one that is merely unenforceable on the grounds of public policy:

It is not only necessary to add that no contract was ever an offence at common law merely because it was in restraint of trade. The parties to such a contract, even if unenforceable, were always at liberty to act on it in the manner agreed. Similarly combinations, not amounting to contracts in restraint of trade were never unlawful at common law. To make any such contract or combination unlawful it must amount to a criminal conspiracy, and the essence of a criminal conspiracy is a contract or combination to do something unlawful or something lawful by unlawful means.

Therefore, for the Crown to invoke the common law on conspiracy in restraint of trade, it had to prove a criminal conspiracy, which in this context would require proof of an agreement established by unlawful means. The other definition of criminal conspiracy, an agreement to do something unlawful, did not apply because agreements in restraint of trade were not illegal; such private contracts were simply *unenforceable*.

Mr. Justice Clute stated that in *Standard Oil*, (1911) 221 U.S. 1, the U.S. Supreme Court construed the *Sherman Act* as "including the word 'unduly' and in its effect very closely resembles the section of the

Criminal Code under consideration." (1917) 39 O.L.R. 495 at p. 511. He asserted that *Adelaide Steamship* was distinguishable from the case at hand, while *Standard Oil* was "closely similar, and much of what was said there is applicable." (P. 511.) See also the *American Tobacco* case for a better statement of the rule of reason, (1911) 221 U.S. 106. A useful discussion of both cases can be found in Bork (1978).

41. (1940) 4 D.L.R. 293 at p. 300.
42. (1955) 3 D.L.R. 449 at p. 476.
43. In *Wampole v. Korn*, Clute, J. stated:

I think the statute was intended to provide against agreements similar to the one in question. [This was an RPM case.] The history of the law shews that it was passed at a time when the law relating to the protection of native industries was being introduced. As an objection to the protective tariff it was argued that combinations might be formed which would destroy competition and so enhance the price; that while upon the one hand foreign goods were excluded, the introduction of which might moderate the price of the article in question, upon the other hand trade combinations might be formed which would destroy competition and greatly raise the price of the commodity to the consumers. To meet that objection the law against restraint of trade was passed. (1906) 11 O.L.R. 619 at p. 628.

See also the remarks by Lord Aiken in the *Proprietary Articles Trade Association* case, (1931) 2 D.L.R. 1 at p. 11, and the comment of Hope, J. in *Container Materials*, (1940) 4 D.L.R. 293 at p. 300, that the "codification [of the common law] was a corollary to the adoption by this country of the economic policy of tariff protection for industry."

44. Traves (1974a, p. 87, n. 4) indicates the cost-of-living index remained virtually unchanged until the end of 1915. Then, in 1916, it increased by 8 per cent; in 1917 it increased by more than 18 per cent, and in 1918 prices rose an average of 13.5 per cent. A Parliamentary Special Committee on the High Cost of Living was established. See its report in House of Commons, *Journals*, Vol. 55, 1919 Part II, Appendix 7.
45. The Board of Commerce was to be a permanent body to administer and enforce competition-policy legislation. A single complaint could start an investigation, or the Board could do so on its own volition. The Board had the power to issue (civil) cease-and-desist orders for violations of the *Combines and Fair Prices Act*. Appeal to the courts from its decisions could be made only on matters of law. The Board had to authorize criminal prosecutions under s. 498 of the *Criminal Code* (the conspiracy provisions) or under the *Combines and Fair Prices Act*. The Board, therefore combined investigation, permission for prosecution and adjudication in civil matters. See Ball (1934, Ch. 7.)

46. See, for example, CD, 19 May 1921, pp. 3603-8, and Traves (1974a, 1974b).
47. *In Re the Board of Commerce Act, 1919 and the Combines and Fair Prices Act, 1919* (1920) 60 S.C.R. 456; (1922) 1 A.C. 191 or (1921) 60 D.L.R. 513.
48. The Special Committee (Canada, 1973c, pp. 7-8) subsequently recommended that certain provisions of the proposed *Competition Act* (Bill C-256, introduced in June 1971) dealing with consumer protection (e.g., misleading advertising, bait-and-switch selling) be split off into a separate bill and enacted immediately. These provisions should not be tied in with the provisions relating to monopolies, mergers, etc., requiring reconciliation with broader policy directions relating to industrial strategy and foreign investment. This was done, but the amendments were not enacted until December 1975. (See Stanbury, 1977a.)
49. See the Food Prices Review Board (Canada, 1976b) final report, for a listing of these studies.
50. For an analysis of the AIB, which operated for three years, and its impact, see Maslove and Swimmer (1980). Following the demise of AIB in 1978, the government established the Centre for the Study of Inflation and Productivity in the Economic Council of Canada. It operated only between June 1978 and March 1979. CSIP was replaced by the National Commission on Inflation, which was given less room to criticize the government's capacity to control inflation. In mid-1982 the federal government introduced a program of moral suasion designed to hold price and wage increases to 6 and 5 per cent in the next two years.
51. Mr. Allmand's remarks were made in the context of a non-confidence motion by the leader of the NDP (Mr. Broadbent) calling for the establishment of a "fair prices commission, with power to investigate and, where necessary, to roll back unfair price increases." (CD, 27 February 1979, p. 3636.)
52. The hostile editorial reaction to Mr. Allmand's speech is described in Stanbury (in process). The Liberals did not bring in a bill. A federal election occurred in May. The Progressive Conservatives formed a minority government.
53. But see Gardiner Means' (1972) work on the administered price hypothesis. On the other hand, the insensitivity of *regulated* prices to macro economic conditions seems clear. See Levi and Dexter (1983).
54. *Annual Report of the Director . . . for the year ended 31 March 1983*.
55. In 1960, the provision became s. 34 of the *Combines Investigation Act*, as it remains today. See Appendix A.
56. H.H. Stevens, who was Minister of Trade and Commerce in the Conservative government of R.B. Bennett, in 1934 argued that the United States had apparently abandoned its antitrust policy and substituted a

policy of regulated combination through the *National Industrial Recovery Act* codes. Canada, he said, should follow this lead. Any attempt to enforce the *Combines Investigation Act* would be "an entirely retrograde movement". He condemned the "selling of goods at less than legitimate cost" and suggested that "we . . . try to find out whether or not the indulgence in unfair and unethical practices is prevalent in this country." (CD, 2 February 1934, p. 200.) Stevens was made chairman of the Royal Commission in Price Spreads, but was later removed from this post. See Forster (1962).

Even the long-established treatment of price-fixing agreements as illegal *per se* was affected by the economic distress associated with the Depression. See the Supreme Court's judgment in *Appalachian Coals*, (1933) 288 U.S. 344, and Posner's (1974, p. 75) comment. Changing patterns in the United States, together with the Depression, produced the *Robinson-Patman Act*, an amendment to the *Clayton Act*, in 1936. The *Robinson-Patman Act* was designed to prevent unfair price discrimination. See Rowe (1980); American Bar Association (1980); and Posner (1976).

57. Under the *Dominion Trade and Industry Commission Act* (25–26 George V, c. 59) administration of both the *Combines Investigation Act* (which was amended) and the *Criminal Code* ss. 496, 497, 498 and 498A was placed under the new Commission.
58. Canadian businessmen have never been enamoured of the benefits of price competition. See Bliss (1974) and Finkel (1979). A very distinguished conglomerateur — long before that term was invented — is said to have described price competition as "the last act of an impoverished mind". Lloyd Reynolds (1940, p. 94, n. 23) remarks:

The bitterness of business men on this point is strongly impressed on one by even a small amount of reading in trade journals. The following is a typical outburst: "The price-cutter is worse than a criminal. He is a fool. He not only pulls down the standing of his goods; he pulls down himself, and his whole trade. He scuttles the ship in which he, himself is afloat. . . . Price-cutting is not business any more than smallpox is health." (Editorial in the *Canada Lumberman* for November 15, 1925, entitled, "Price Cutting is Peanut Salesmanship".)

59. *Attorney-General for British Columbia v. The Attorney-General for Canada et al.* (1937) A.C. 368; 1 D.L.R. 688.
60. *Reference re Dominion Trade and Industry Commission Act, 1935* (1936) S.C.R. 379; 3 D.L.R. 607; (1937) A.C. 405; 1 D.L.R. 702. Note that the Privy Council upheld the *DTIC Act*, but s. 14 was excluded from the Reference. Section 14 permitted the Commission to sanction industrial agreements designed to prevent "wasteful" or "demoralizing" competition. On the day of the Supreme Court of Canada's ruling,

Senator Arthur Meighen exclaimed, "We struggled so much to legitimize combines that we exceeded the Constitution." (SD, 17 June 1936, p. 525.)

61. The original s. 498A of the *Criminal Code* read as follows:

Every person engaged in trade or commerce or industry is guilty of an indictable offence and liable to a penalty not exceeding one thousand dollars or to one month's imprisonment, or, if a corporation, to a penalty not exceeding five thousand dollars, who

- (a) is a party or privy to, or assists in, any transaction of sale which discriminates, to his knowledge, against competitors of the purchaser in that any discount, rebate or allowance is granted to the purchaser over and above any discount, rebate or allowance available at the time of such transaction to the aforesaid competitors in respect of a sale of goods of like quality and quantity;

The provisions of this paragraph shall not, however, prevent a co-operative society returning to producers or consumers, or a co-operative wholesale society returning to its constituent retail members, the whole or any part of the net surplus made in its trading operations in proportion to purchases made from or sales to the society;

- (b) engages in a policy of selling goods in any area of Canada at prices lower than those exacted by such seller elsewhere in Canada, for the purpose of destroying competition or eliminating a competitor in such part of Canada;
- (c) engages in a policy of selling goods at prices unreasonably low for the purpose of destroying competition or eliminating a competitor. (S.C. 1935, c. 56, s. 9.)

The present version, now s. 34 of the *Combines Investigation Act*, can be found in Appendix A.

62. Alvin Finkel (1979, p. 35) notes that "the demand for the Price Spreads Commission began with a private request from the Canadian Manufacturers Association. Many manufacturers complained to Stevens [then Minister of Trade and Commerce] that mass buyers, particularly department and chain stores, forced them to sell their products at unreasonably low prices. Only state enforcement of wholesale prices determined by the trade organizations could reverse this trend." They were joined by the Retail Merchants Association.

The real problem here is that if competitors are to be protected, the result may be to prevent more efficient firms from lowering prices to expand their business. The comparable U.S. legislation—the *Robinson-Patman Act* enacted in 1936—has been bedevilled by this problem. See, for example, Posner (1976); Rowe (1980); and American Bar Association (1980). For proof of the proposition that in-

- fluent U.S. legislators perceived the *Robinson-Patman Act* as designed to protect small business, see *Price Discrimination, the Robinson-Patman Act, and the Attorney General's National Committee to Study the Antitrust Laws*, A report of the Select Committee on Small Business, House of Representatives (Washington, DC: USGPO, 1956). This report is reproduced in the *Journal of Antitrust Law and Economics* 11, No. 2 (1980): 665-742.
63. See, for example, Nozick (1976) and Dunlop (1979).
64. Mr. Ilsley was to become the Chairman of the Royal Commission on Patents, Copyright and Industrial Designs whose *Report on Patents of Invention* was published in 1960.
65. The problem, as seen by legislators, persists. In 1960 Parliament passed what is now s. 35 of the *Combines Investigation Act* prohibiting discriminatory advertising allowances. Pressure by smaller grocery-product manufacturers and distributors resulted in the Ontario Royal Commission on Discounts, Rebates and Allowances in the Grocery Trade established in 1978. Its *Report* was published in 1980.
66. This problem reappeared following the acquisition of Zeller's Ltd., Simpsons Ltd., and 36 per cent of Simpsons-Sears Ltd. by the Hudson's Bay Co. in 1978 and 1979. See, for example, *Maclean's* (28 July 1980), p. 37; *Ottawa Journal* (10 July 1980), p. 1; and the *Annual Report of the Director . . . for the year ended 31 March 1979*, pp. 21-25.
67. Perhaps the best-known formulator of this approach to competition policy is Robert Bork (1978) whose views are discussed in Chapter 4. He would find much in common, and much to admire, in Mr. Young's views.
68. Two recent cases dealing with predatory pricing may reverse this situation. See *R. v. Hoffman LaRoche* (1980) 53 C.C.C. (2d) 1 (upheld upon appeal); (1982) 62 C.C.C. (2d) 118, which is discussed in Gorecki (forthcoming). See also *R. v. Consumers Glass et al.* (1982) 57 C.P.R. (2d) 1; 124 D.L.R. (3d) 274.
69. See, for example, Posner (1976); Kintner (1970); Rowe (1980); American Bar Association (1980); and U.S. Dept. of Justice (1977). Concerning the United Kingdom, see U.K. Monopolies and Mergers Commission (1981).
70. More generally, see McConnell (1971), who compares Bennett's and Roosevelt's "New Deals" and how both sought to administer prices to facilitate recovery to full employment. See also Forster and Read (1979) and Finkel (1979).
71. See Canada (1888); the judgment in *Wampole v. Karn* (1906) 11 O.L.R. 619; and the *Annual Reports* of the Registrar under the *Combines Investigation Act* in the 1920s. The extent of the practice in the late 1940s is documented in the work of the MacQuarrie Committee (Canada, 1952). See also the *Minutes of Evidence and Proceedings* of the Parliamentary Joint Committee on Combines between 13 November and 7 December 1951, and Skeoch (1966b).

72. (1976) 25 C.P.R. (2d) 145 at p. 149. O'Sullivan, J. also stated:

Were I permitted to rely on parliamentary debates as an aid in constructing the section, I would have relied on Hansard for the second 1951 session when the section was enacted under threat of closure in the dying days of that year. I would have relied on Mr. St. Laurent's dramatic intervention in the debate on December 27, 1951, when he said the bill was merely designed to provide that there should not be a system of price controls organized by private agreement and enforced by such coercive measures as those who provide the product, the resale price of which is fixed, chose to exercise themselves. But as enacted, the section of course goes much further than Mr. St. Laurent may have thought. It is not limited to coercive measures. The section makes it an offence to induce resale price maintenance by any means whatsoever. (1976) 25 C.P.R. (2d) 145 at p. 150.

The last sentence refers to the amendments made to s. 38, effective 1 January 1976, which strengthened the provision considerably. See Bureau of Competition Policy (Canada, 1976a).

73. Excellent illustrations can be found in *R. v. H.D. Lee of Canada Ltd.* (1981) 57 C.P.R. (2d) 186; and *R. v. Cluett, Peabody Canada Inc.* (1982) 64 C.P.R. (2d) 30.
74. See *P.A.T.A. v. The Attorney General for Canada* (1931) A.C. 310; 55 C.C.C. 241; 2 D.L.R. 1. Finkel (1979, p. 28) states that the association consisted of over 2700 retail druggists, 157 manufacturers of proprietary medicines and toilet articles, and 28 wholesale druggists.
75. Very recently, the American antitrust authorities appear to be moving to a 'rule of reason' approach to price maintenance, often called 'fair trade' in the United States. See *New York Times* (25 September 1983), pp. 1, 28F.
76. See, for example, Garson (1950, 1956a, 1956b, 1957), and CD, 24 November 1949, p. 2158. T.D. MacDonald expressed a similar view in an address to the Lawyer's Club as follows:

Frequently, it seems to be considered that the two methods, that is, the rule of competition, or the rule of reasonableness of prices and profits, are simply alternative methods of arriving at the same objective. Does this assumption bear critical examination? Does the high standard of living enjoyed on this Continent today depend merely upon prices being reasonable or, is there a difference between prices that are merely reasonable and prices that are the best which a virile competition can produce? It has been suggested that competition can resist many cost increases that could not be regarded as unreasonable and that it leads to the adoption of innovations and economies long before parties could

be described as unreasonable for not attempting them. Are we, in short, actually considering two entirely different kinds of social organizations — the free enterprise system on the one hand, and a public utility or collectivist system on the other hand? (MacDonald, 1955a, p. 15.)

77. On 11 June 1959 the Conservatives introduced Bill C-59, a series of amendments to the *Combines Investigation Act*. It was withdrawn. Another amending bill was introduced on 6 May 1960. It became effective on 10 August: see Stanbury (1981a, pp. 7, 8.)
78. Fulton (1959a, p. 14). The Minister subsequently likened the anti-combines legislation to a hockey referee, "the policeman to preserve the rules of the game". Perhaps incongruously for the Minister responsible for introducing the loss-leader defences to the prohibition of refusal to deal, Mr. Fulton stated that the objective of the legislation was "to maintain . . . the maximum of price competition for the benefit of the consuming public and of the economy generally."
79. Fulton (1959b, p. 5). The Minister emphasized that these rules should be ones of general application, and not a detailed list of specifics of what may or may not be done.

Our approach is based on the principle that government should ask Parliament to enact legislation setting forth in clear terms what are the rules of general application, so that business itself may know what are the rules which society believes should govern it, but leaving it to the courts, not to government, to decide in a specific case whether the rules have been broken. (Fulton, 1959b, p. 9.)

80. See, for example, Economic Council of Canada (1979, 1981); Priest and Wohl (1980); and Stanbury and Thompson (1980).
81. See, for example, Stanbury and Thompson (1982a, 1982b); Hartle and Trebilcock (1982); and Reschenthaler *et al.* (1982).
82. It has been suggested that we already have corporatism in Canada: see McKie (1977).
83. *Congressional Record*, Vol. 95, 1949, p. 11486.
84. *Congressional Record*, Vol. 96, 1950, p. 16452.
85. (1962) 370 U.S. 294.
86. In *Northern Pacific Railway v. United States* (1958) 356 U.S. 1 at p. 4, the Court said the *Sherman Act* was

. . . a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material

progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.

Contrast the breadth of this philosophical commitment to, for example, Commissioner McGregor's (1946c) explanation of his role in enforcing Canadian competition policy legislation. He repeatedly emphasized in his speeches that the Act was not designed to regulate business, rather it was designated to be "anti-monkey-business". He saw the Combines Branch as "neither gestapo nor bureaucracy nor a body of snoopers; it is made up of a group of Canadian citizens who have been assigned the job of assisting in keeping the channels of trade clear of artificial obstructions that are bad for business itself as well as bad for the public; a group of men who are taking their work seriously without taking themselves too seriously."

McGregor saw himself as a "traffic cop in congested areas, not telling businessmen and others where to go, but preventing traffic jams, restraining road hogs and speeders, reckless drivers and other offenders who may disregard the rules of the road." (McGregor, 1946c, pp. 3-4.)

In a speech to the Standard-Imperial Oil Conference McGregor used a railway analogy to describe the anti-combines organization in the Department of Justice: "a maintenance-of-way organization to see that the tracks are kept clear of obstructions, that the whole road-bed on which the nation's business travels is maintained on a sound and safe and solid basis." (McGregor, 1945, p. 9.)

McGregor (1946a, p. 13) did, however, have a clear vision of what he meant by a system of private enterprise: "freedom must exist for buyers as well as sellers; public benefits, as well as private benefits, must be abundantly apparent; and real enterprise, individual initiative, must not be curbed by all kinds of restrictive agreements designed to prevent the active competition of active competitors. Competition is still the life of trade."

87. (1972) 405 U.S. 596 at p. 610.
88. See, for example, *Annual Report of the Director* . . . for the year ended 31 March 1979; Stanbury (1981c); and Richardson Securities (1979). The Royal Commission on Corporate Concentration (Canada, 1978) was prompted by the attempted take-over of Argus Corp. by Power Corp. in 1975. The total number of mergers in Canada in recent years was as follows:

Year	Foreign Acquirer	Domestic Acquirer	Total Mergers
1976	124	189	313
1977	192	203	395
1978	271	178	449
1979	307	204	511
1980	234	180	414
1981	200	291	491
1982p	371	205	576

89. (1977) 32 C.C.C. (2d) 1; 72 D.L.R. (3d) 82. See Reschenthaler and Stanbury (1977); Roberts (1977); and Cairns (1981a, 1981c).

90. See, for example, Ouellet (1981b, p. 9, 1981a, p. 7, 1980, p. 4).

91. See Paul Taylor, "NEP Has Firms Scrambling for Ways to Alter Foreign Status", *Globe and Mail* (27 July 1981), p. B5, which gives the following list of "NEP-inspired takeovers".

Target Company	Controlling Shareholder	Buyer	Amount	Per Cent
Petrofina Canada	Petrofina S.A. Belgium	Petro-Canada	\$1.46-bil.	100
Hudson's Bay Oil	Conoco Inc., U.S.	Dome Petroleum	\$2-bil.	53
Aquitaine Canada	Elf-Aquitaine France	Canada Devel. Corp.	\$1.16-bil.	75
Candel Oil	St. Joe Minerals, U.S.	Sulpetro	\$546-mil.	92
Great Basins (Cdn. assets)	Great Plains Petroleum, U.S.	United Canso	\$165-mil.	—
Shell Explorer (Cdn. assets)	Shell Oil, U.S.	Husky Oil*	\$430-mil.	—
Merland Explor.	R.J. Adams, Bermuda	Turbo Resources	\$121-mil.	55

*This merger was not completed

92. See, for example, the Director of Investigation and Research's seven-volume study of the petroleum industry (Canada, 1981a).
93. See, for example, Cohen (1971); Thompson (1977); Orr (1975); and Quinlan (1972).
94. See Kaiser (1979, pp. 44-48) and Bureau of Competition Policy (1976). The actual operation of the new provisions is described in the Bureau of Competition Policy's *Misleading Advertising Bulletin*, which has been published quarterly since 1974. See also Canada (1983).
95. Ouellet (1975, p. 3). More generally, see Stanbury and Burns (1982).
96. This approach is similar to that of John Baldwin (1975) who advances a theory of government regulation in which governments utilize regulation as a vehicle to ameliorate social and economic conflict. In the typical case the legislature delegates authority to a specialized agency to regulate entry into the field, the prices charged and the conditions of service to be provided by a public utility, e.g., telephones, or the distribution of natural gas or electricity. The agency's job is to mediate the conflicting interests of the owners of the enterprise, the purchasers of the product or service, employees of the regulated firm (less frequently) and actual or potential competitors. Essentially, regulation is to be used to effect compromises and otherwise to reconcile conflicting interests. The property of shareholders is not to be expropriated by tariffs, rates or prices that are 'too low' and consumers are not to be 'exploited' by prices that are 'too high'.
97. This is questionable in light of the low level of fines imposed and the fact that few individuals (as opposed to corporations) are charged, and only one or two have actually gone to prison (for misleading advertising, but not a combines offence). See Stanbury (1976, 1983), and the Tables in Appendix B. Moreover, we would not agree with the implication that the Director of Investigation and Research allows political factors to influence enforcement strategy.
98. Richard Schultz (1980), in the context of trucking regulation, provides considerable evidence to support the 'bureaucratic politics' model of government policy formulation. In this model, policy outcomes are the result of bargaining among a variety of actors pursuing different objectives, whose power to influence the result varies over time. Such a model stands in contrast to the 'rational actor' model in which policy is seen as the consequence of deliberate choice among a number of well-specified alternatives in order to best achieve a well-ordered set of objectives that are fairly stable.
99. More generally, see the *Sault Ste. Marie* case (1978) 40 C.C.C. (2d) 353 (Supreme Court of Canada).
100. See, for example, Gorecki and Stanbury (1979a); Gorecki (1981a); and Gorecki (forthcoming).
101. See, for example, Stanbury (1977a, 1981a); Stanbury and Reschen-thaler (1981); and Stanbury (in process).

102. For a somewhat similar view, see Skeoch-McDonald (1976). See also Brecher (1982) and Green (1981).
103. The importance of this assumption should be emphasized. Consider, for example, the recommendations of the Business Council on National Issues (1981a). If these were adopted, the policy would be greatly weakened. See Stanbury (1981b). For the latest developments, see Stanbury and Reschenthaler (1981); Linda McQuaig, "Ottawa's Cautious Competition Bill", *Maclean's* (18 July 1983), pp. 36-38; and *Globe and Mail* (24 August 1983), p. B1.
104. More generally, see Finkel (1979).
105. This approach, proposed by sociologists, assumes that laws are specifically aimed at maintaining class interests. (Goff and Reasons, 1978, p. 33.) More generally, see Chambliss (1974).
106. The authors point to the composition of the Royal Commission on Corporate Concentration (Canada, 1978) and Clement's (1975) study of the corporate élite in Canada.
107. For a different analysis of the administration and enforcement of competition legislation in food processing and distribution, see Stanbury (1979a).
108. In light of the decisions in the *Canadian Breweries* (1960) O.R. 601 and *B.C. Sugar* (1962) 32 W.W.R. (N.S.) 577 cases, this suggestion is surprising. In light of the Supreme Court of Canada's decision in *K.C. Irving* (1977) 32 C.C.C. (2d) 1 (which was handed down after Jones' article was published), this proposal was impossible to implement without new legislation that has not been enacted as of August 1983.
109. See the discussion in Stanbury (in process).
110. The Business Council on National Issues (1981a) strongly recommends both that the Director's formal powers of investigation be sharply reduced and that he be made subject to the direction of the Minister of Consumer and Corporate Affairs at all times. See the critique in Stanbury (1981b).
111. See Rosenbluth and Thorburn (1963) for a discussion of the "Flour Milling Report" and Commissioner McGregor's resignation in 1949. See also *Winnipeg Free Press, The McGregor Controversy and the Combines Act* (Winnipeg, Pamphlet No. 29, 1949).

6: *Summary and Conclusions*

Thirty years ago Ian MacKeigan, an experienced counsel and a former Deputy Commissioner under the *Combines Investigation Act*, long familiar with the views of businessmen, wrote that "most businessmen do not know of [the competition policy] law, or completely misunderstand its objectives and effect, or are violently opposed to it."¹ A few years later, George Wilson, an economist, made the same point and argued that one of the reasons that businessmen are opposed to the legislation "is ignorance of its purposes."² As he saw it, they simply do not appreciate the economic and non-economic benefits of a competitive system. Moreover, Wilson (1959, p. 173) recommended that:

... Parliament should provide a careful statement of the objectives and purposes of the anti-combines laws, and emphasize their positive (i.e., preserve and promote a free enterprise system) rather than negative (i.e., prohibit certain practices deemed to have a detrimental effect) aspects.³

D.H.W. Henry, in his many speeches in the 1960s, often remarked that there was a good deal of ignorance surrounding the Act among businessmen.

In this study we have provided a detailed review and analysis of the objectives of the policy since its inception almost a century ago. We have done so in the hope that businessmen (and others) who read this volume will both better understand the objectives and perhaps acquire a greater sympathy for them.⁴

In Chapter 1 we argued that the first step in evaluating the performance or effectiveness of competition policy is to have a full and well-specified set of objectives, with some indication of their relative significance. Our analysis in this respect leads us to a number of conclusions that we now set out.

The Major Objectives

While a fairly large number of objectives⁵ have been ascribed to Canadian competition-policy legislation over the past ninety years or so, three main themes stand out. These are:

- Preventing abuses of economic power and thereby protecting the interests both of consumers and of those businessmen who want to be free to act in a competitive fashion. This view has been articulated by Parliamentarians, particularly in 1889 and 1910, when new legislation was enacted, and by the judiciary, particularly in cases prior to World War I, but occasionally thereafter, as well.
- 'Maintaining free competition'. This is a judicial concept, although not a well-defined one, which seeks to ensure that unreasonable or undue restraints on competition are struck down. This view can be found in the earliest judgments and in most judgments up to the 1970s, but since that date it has been largely ignored, rather than rejected, by the courts.
- Achieving economic efficiency, broadly defined to include the encouragement of the lowest cost of production and distribution, the least restriction on output, and the facilitation of technological and organizational change in a dynamic economy. This view has been advanced largely by economists, most strongly since the late 1960s, and by the 1970s it formed the most important analytical basis for reforming Canadian competition-policy legislation.

In 1889 the framers and supporters of the first competition legislation, *An Act for the Prevention and Suppression of Combinations Formed in Restraint of Trade*, had a clear idea of what they expected the law to accomplish. It was intended, as we saw in Chapter 2, to prevent agreements or other arrangements among competitors that raised prices (or debased the quality of products) and 'rooked' the consumer or the farmer. In moving Second Reading on the proposed legislation, Mr. Wallace, the M.P. who had originally pressed for the legislation in 1888, described the profits made by one combine in the nation's capital as follows:

From the investigations which we held last winter — and they were pretty thoroughly made — we found that the coal men in the city of Ottawa controlled not only their own business in the combination, but controlled also all those who started or wished to engage in the business of importing or selling coal. We found that three men, with an aggregate capital of \$15,000, after paying enormous bonuses to those who were not in the ring — \$10,000 to one man, \$5,000 to another, and to others less or greater sums than these — divided amongst themselves, on a capital of \$15,000, after paying all expenses of management, and all the expenses of the combination, \$33,000. (CD, 8 April 1889, p. 1111.)

These profits, of course, were exacted from the buyers of coal.

The law was also to ensure that those businessmen who sought to restrain trade were not able to coerce their competitors who wished to remain free of agreements to curb competition by such means as predatory pricing, refusal to deal or similar 'disciplinary' practices. For example, during debate in 1890 on a bill to amend the Act of 1889, Senator Read described how a wholesale grocer had to pay 80 cents per barrel more for sugar because he refused to join a refiner-wholesaler combine. (SD, 7 May 1890, p. 714.)

The proponents of the law of 1889 genuinely believed that "competition is the life of trade", even though it makes life challenging, or even rather difficult, for businessmen. They believed that prices, particularly of the 'necessaries of life,' should be set by the forces of competition. Free and open competition would protect the interests of consumers and the interests of businessmen who wanted to prosper by offering lower prices, higher quality, or new types of goods and services to the public.⁶

The framers of Canada's early legislation were *not* hostile to big business in general. Indeed, they believed that the nation as a whole stood to benefit from "large aggregations of capital". W.L. Mackenzie King, when he introduced the first *Combines Investigation Act* in 1910, made this clear when he stated that the legislation was

... not aimed against combines or mergers as such, but rather against the exercise on the part of combines, mergers or monopolies, in an unfair manner, of the powers which they may get from that form of organization. . . . This measure seeks to afford the means of conserving to the public some of the benefits which arise from large aggregations of capital for the purpose of business and commerce. (CD, 18 January 1910, p. 2057.)

Mr. King (then the Minister of Labour) and other legislators were of the view that with the power that accompanies large size went responsibility, particularly when large firms also accounted for a considerable share of their markets.⁷ Such power, the legislators said, must not be abused. Consumers, workers and competitors must not be exploited, although it was recognized that fair competition could be tough and weak competitors would be weeded out. Such a system of free enterprise and free competition was believed to deliver the highest standard of living for the nation.

King would probably have little dispute with policy makers' frustrated efforts to reform the legislation since 1971, when Bill C-256 was introduced. While the central objective of that bill, of the ill-fated Bills C-42 and C-13, in 1977, and of the Minister's proposals in 1981 was to ensure that resources are allocated efficiently, the details of the proposed legislation would have been consistent with King's views. For example, monopoly as such was not condemned. Rather, the abuse of monopoly power (dominant position) expressed in terms of 'bad behaviour' (predatory or exclusionary conduct) was to be proscribed. A monopoly position obtained by fair means such as greater efficiency or innovation was not to be attacked. Moreover, mergers, even if they lessened competition 'substantially', could be permitted if they were likely to result in real gains in efficiency.⁸ In general terms, the concentration of economic power would not be constrained by competition policy legislation — except where it resulted in certain types of restraint of trade as defined in the Act.

As we described in detail in Chapter 3, from the earliest cases, the Canadian courts have consistently held that the public is entitled to the right of 'free competition', a term of ancient lineage even before the twentieth century. Oppressive and unreasonable restrictions on competition, the courts said, have been prohibited by Parliament. In the first price-fixing case to reach the Supreme Court of Canada, Chief Justice Sir Charles Fitzpatrick stated that the legislation was aimed at "the undue and abusive lessening of competition which operates to the oppression of individuals or is injurious to the public generally."⁹

The courts have made it abundantly clear that although agreements to fix prices or allocate markets may be "advantageous or even necessary for the protection of the business interests of the parties", they are condemned by the legislation. The public's right to free competition must predominate if the agreement is held to lessen competition "improperly, inordinately, excessively or oppressively", to use the words of the trial judge in the first combines conviction in 1903.¹⁰

It should also be emphasized that while the courts embraced what has been called 'the doctrine of free competition', their approach to price-fixing and market-sharing agreements was different from that of their counterparts in the United States. This difference, in turn, reflected important differences in the legislation itself. While Canada prohibited agreements that lessened competition *unduly*, the U.S. legislation (s. 1 of the *Sherman Act* of 1890) declared "every contract, combination...or conspiracy in restraint of trade...is...illegal." Beginning with the *Trans-Missouri Freight Association*¹¹ case in 1897, the U.S. Supreme Court held that all agreements designed to fix prices or share markets were illegal *per se*. It should be emphasized that all agreements in restraint of trade were not held to be illegal *per se*, but only those that fixed prices or were designed to have that effect.¹²

In practice, at least as far as the decided cases were concerned, the differences between the Canadian and American policies were smaller than the language of the statutes would indicate. The Canadian courts convicted in virtually every case where the accused accounted for 50 per cent or more of the market and had sought to fix prices or allocate markets.¹³ The reach of the *per se* rule in the United States was widened over time by the courts¹⁴ while the Canadian cases prosecuted in Canada, until recently, were largely 'garden variety' horizontal agreements to fix prices or carve up markets.¹⁵ Between 1924 and 1975, the Crown won 90 per cent of such cases. Between 1975/76 and 1979/80, however, it won only 58 per cent of conspiracy cases. In the last three years it won only 42 per cent. (See Table 5-B in Appendix B.) In the most recent conspiracy cases to reach the Supreme Court of Canada, *Aetna Insurance* in April 1977 and *Atlantic Sugar* in July 1980, a majority of the Court has retreated from its earlier rulings.¹⁶ In fact, it has severely weakened the law.¹⁷

The idea that economic efficiency should be the principal objective of competition policy is of fairly recent origin as we noted in Chapter 4. While it was given some weight in the 1950s, perhaps the strongest endorsement was given in 1969 by the Economic Council of Canada, which said, "the main objective of competition policy should be that of obtaining the most efficient possible performance from the economy...in dynamic as well as static terms...and the avoidance of economic waste..."¹⁸ Efficiency, of course, is not an end in itself. Rather, it is the means by which the material well-being of all Canadians may be increased. The Council argued that competition is desired because it is the most important means to achieve economic efficiency.

In the preamble of Bill C-256, introduced in 1971, it was argued that not only is competition the best means of achieving efficiency, but also that it is the best method to transmit the benefits of efficiency to the public and an effective way to decentralize economic power. Both the Skeoch-McDonald report in 1976 and the proposed Stage II amendments in 1977 (Bills C-42 and C-13) gave more weight to "the dynamic forces that have been responsible for the prodigious economic growth" that the market system has achieved. Dynamic efficiency is concerned with innovation in technology and organization that produces new products and services and that results in ways to produce existing outputs at lower cost or to improve their quality. The essence of dynamic efficiency is flexibility and adaptability to changing economic and social conditions. In such an environment, entrepreneurial skills are stimulated and rewarded. In an economy of opportunity and of choice, the role of competition policy is to strike only at those activities that would give competitors an advantage not attributable to superior economic performance.

The Lesser Objectives

In addition to the major objectives, we found that there have been a number of lesser ones; these were presented in Chapter 5 and are summarized in Table 6-1. The original legislation of 1889 was widely believed to be declaratory of the common law, although, in fact, it was not.¹⁹ This mistake, however, did not perceptibly influence the subsequent development of the jurisprudence.

Governments, in periods of high inflation, have regularly stated that competition policy is useful in curbing rising prices. The first *Combines Investigation Act*, enacted in 1910, stemmed, at least in part, from the political pressures attributable to the bout of inflation occurring at that time. The same forces resulted in the *Board of Commerce Act* and the *Combines and Fair Prices Act* passed in 1919. The latter provided for the direct control of prices. In 1951, when resale price maintenance was prohibited, one of the arguments given to support the move was that the practice was inflationary. When Bill C-256 was introduced in 1971, the Minister responsible argued that a tough competition policy could "help to moderate inflation".

On a number of occasions, changes in the legislation have been advanced as being of particular benefit to small business. In 1935, in the midst of the Great Depression, the federal government introduced legislation to prevent price discrimination and predatory pricing, thus protecting small business from 'unfair' and 'ruinous'

competition. It has been argued recently, incorrectly in our view, that resale price maintenance was made illegal in 1951 to protect small business. Canada has never gone as far as the United States in protecting small firms even at the expense of the competitive process itself. The latter has been most noticeable in the language and enforcement of the *Robinson-Patman Act* of 1936.²⁰

Primarily during the 1950s, competition policy was seen by the Ministers responsible for its enforcement as being of service in 'maintaining the free enterprise system'. If private restraints were not limited by anti-combines legislation, it was argued, popular political pressure would result in greater government intervention in the form of direct regulation, or public ownership. Alternatively, a form of corporatism would emerge. The former theme emerged again in 1981, when the Minister of Consumer and Corporate Affairs argued that businessmen should not oppose reforms to competition legislation.

In the 1960s and 1970s one of the lesser objectives of competition policy was to maintain fairness and honesty in the market-place. The implementation of this objective saw the introduction into the Act of offences related to misleading price advertising, misleading and deceptive statements of fact, and misleading statements and guarantees of performance not based upon a proper test. Beginning in the 1970s, a large number of charges have been brought under these sections of the Act.²¹

Finally, the objectives of Canadian competition policy can be thought of as a political compromise between the conflicting interests of consumers and producers (i.e., business). The policy, in practice, is perceived by some political scientists, sociologists and economists as paying lip-service to the objectives of 'efficiency', 'competition', and the 'prevention of monopolistic exploitation' while, at the same time, not seriously inconveniencing the business community's freedom of action and instinct to impose a wide variety of restraints of trade.

This study of competition policy indicates that the same piece of legislation may properly effect a number of objectives. This finding applies particularly to the lesser objectives. It reflects the fact that some of the objectives are rather general and cannot be clearly identified with specific sections. These objectives include fighting inflation (although it must be admitted that on two occasions this was linked to specific actions), maintaining the free enterprise system, and achieving economic efficiency. Although another objective, maintaining free competition, might sound rather general, it has been given meaning by the judiciary.

Objectives in Conflict?

Are the major objectives in conflict? It is quite common for public policies to be intended to achieve a number of conflicting objectives. In the case of competition policy, however, legislation that has been intended chiefly to prevent abuses of economic power, to maintain free competition, and to ensure economic efficiency, the multiple objectives are *not* in conflict in any significant way. A law that seeks to prevent price-fixing and market-sharing agreements, mergers that would substantially reduce competition and exclusionary conduct, or a law that prohibits price maintenance by suppliers, is also clearly aimed at curbing behaviour inimical to economic efficiency. By and large, the forces of competition are the best guarantee that resources will be allocated efficiently.²²

In the real world, however, effective competition is *not* a self-sustaining process. Government must act to inhibit economic actors from imposing private restraints upon competitive behaviour. The legal doctrine of 'free competition', as established by the Canadian judiciary in light of the statutory provisions, permits those restraints upon competition that do not lessen competition 'unduly'.²³ In his "Proposals for Amending the Combines Investigation Act" of April 1981, the Minister of Consumer and Corporate Affairs wished to adopt the *per se* approach to price-fixing and market-sharing agreements or those that would prevent entry of a new competitor.²⁴ More recently, the Minister seems to have altered this approach.²⁵

To the extent that the interpretation of the Canadian doctrine of free competition by the courts *fails* to prohibit agreements or arrangements to restrict competition, it may be in conflict with the other two major objectives of preventing abuses associated with market power and achieving economic efficiency in its several dimensions. Most relevant in this context are the judicial interpretations of the merger provisions (i.e., *Canadian Breweries, B.C. Sugar*, and *K.C. Irving*),²⁶ which appear to clash with the doctrine of free competition.²⁷ For example, when B.C. Sugar took over another refiner in Manitoba, it then had 100 per cent of the B.C., Alberta and Saskatchewan markets and 75 per cent of the Manitoba market. In the *Irving* case, systematic acquisition of all five English-language daily newspapers in New Brunswick, the Supreme Court of Canada said, was held not to have lessened competition "to the detriment or against the interest of the public, whether consumers, producers or others."²⁸ No specific abuses following from the merger or monopoly were found. Such decisions point to an important conflict in the objectives of legislation intended, *inter alia*, to prevent abuses of economic power and to promote economic efficiency and the

application of the doctrine of free competition outside the area of conspiracies.

Reconciliation of what we have identified as the three major objectives of Canadian competition policy can be found in the work of Robert Bork (1978) writing on U.S. antitrust policy. He argues that the only legitimate goal of competition policy is the maximization of consumer welfare. The administrators and interpreters of the legislation can achieve this objective by interpreting 'competition' as a state of affairs in which consumer welfare cannot be increased by judicial decree. Bork argues, quite convincingly, that consumer welfare, which he takes to be society's wealth, depends upon achieving both allocative efficiency and productive efficiency. The former term refers to the placement of resources where consumers value them most, while the latter term refers to the effective use of resources by particular firms.

The task of competition policy, therefore, is to frame laws, the enforcement of which will prevent firms taking actions that would impair allocative or productive efficiency. Bork, of course, acknowledges that these two types of efficiency can come into conflict in certain cases — an outcome much more likely to occur in Canada than in the United States. This is likely to happen where the size of the market is often small in relation to plant scale economies and length of production run. (Gorecki, 1976.) An obvious case is that of a merger which would increase productive efficiency, but simultaneously reduce the number of competitors. The result of the latter effect could be a restriction of output below that which would occur under competitive conditions. In general, however, a competition policy aimed at maximizing consumer welfare will prevent abuses of economic power, maintain free competition, and achieve a high level of economic efficiency.

We emphasize that the objectives of protecting small business can easily result in protecting competitors, not competition. Therefore, this objective can be in conflict with the other major ones. The protection of small business, however, has been a minor theme in Canadian competition policy. It is unusual for a policy with multiple objectives to have all the major and most of the lesser objectives largely consistent with one another. If all the objectives are consistent, then competition policy as a political compromise is not an accurate reflection of the process by which competition-policy objectives are formulated. Where everybody agrees with the objectives — which may be 'motherhood' — they may have very different views about how successfully they are implemented.²⁹

Stated versus Real Objectives

A number of different groups in society — small corporations, large corporations, Canadian as distinguished from foreign-owned firms, consumers, trade unionists, economists — have different views on what ought to be the objectives of competition policy. The views may or may not agree with the 'stated', 'public' or 'apparent' objectives of competition policy that have been the subject of this book. To the extent that those who disagree with the stated objectives are able to affect policy outcomes, by presenting briefs to Parliament, making speeches, and so on, then the administration and enforcement of competition policy may not reflect the attainment of the stated objectives. These factors, together with such other influences as interdepartmental conflict on the policy, changing perceptions of the role of government, and public attitudes towards corporate crime, may lead to policy outcomes that reflect different objectives from those found in the parliamentary debates, and so forth. This had led some observers to conclude that the outcome of competition policy reflects a compromise among various groups' views as to the objective(s) of the policy. Typically, each has a model of how the political system functions — pluralist, Marxist, and the like — and then sees whether observed behaviour is consistent with the outcome predicted by the model. They have concluded that the objectives, as reflected by the administration and enforcement of the Act, represent a compromise between the stated objectives and the interests of the various groups. It is, therefore, not so much that the actual or real objectives imply a hidden agenda, but that the political system typically results in compromise in virtually all areas of policy. Hence, the analyst who attempts to see the degree to which the stated objectives of competition policy are realized may turn to political compromise as an explanation for any shortfall in attainment of stated objectives.

Even from the stated objectives of Canadian competition policy one cannot derive easily a set of refutable propositions that may be tested by reference to the data available concerning the policy in action. There have been only two studies that have attempted to measure the success of competition policy against stated goals. Both suggest, even with the imperfect data available, that the objectives are not being attained, and that a number of changes in enforcement policy should be made.³⁰

Different Objectives at Different Times

Different objectives have been espoused at different times. (See Table 6-1.) For example, in the last decade of the nineteenth century, declaring the common law was an important objective, while inflation was of considerable significance in 1910, 1919 and 1951. In this respect two points should be noted. First, the three major objectives were found to be important over considerable periods of time, while the lesser themes were emphasized at different points for short periods of time. Secondly, the emphasis on different objectives over time was most notable in the case of politicians. This reflects their use of competition policy as an instrument to solve short-term political problems. If such problems are not solved, at least the government can be seen to be 'doing something'. Preserving the free enterprise system became very important during the Cold War; competition policy was held to be important in fighting inflation when price increases worried consumers, while the emphasis on fairness and honesty in the market-place was a response to the consumerism of the 1960s. Therefore, those wishing to understand the objectives of competition policy should be cognizant of the minor themes emphasized during the selected periods and the political backdrop against which they took place. At the same time, they must not ignore the few enduring themes, even though they may be somewhat muted at times.

An Increasing Number of Objectives

The number of objectives that competition policy is supposed to achieve has increased over time. In 1889 there were only two: declaring the common law and preventing the abuses of economic power. Today there are many more: maintaining free competition, protecting small business, achieving economic efficiency, ensuring fairness and honesty in the market-place, and preventing the abuses of market power. This increase in number reflects the fact that an objective prominent in, say, the 1930s may have resulted in an amendment that remained in the Act. For example, the price discrimination and predatory pricing amendments were introduced in 1935 and still remain in the *Combines Investigation Act*.³¹ In contrast, efficiency considerations have dominated the policy objectives since the 1960s, but it has been impossible to reform the merger and monopoly provisions or to permit the exemption of specialization agreements.³² The number of 'new' objectives emerging over time may be somewhat deceiving as several of the lesser themes are an

elaboration of a major theme. For example, protecting small business through legislation against predatory pricing could be considered as part of the major objective of preventing abuses of economic power.

Table 6-1: *The Objectives of Canadian Competition Policy, 1888-1983*

<i>Objectives</i>	<i>Principal Proponents</i>	<i>Period in which this Objective was Emphasized</i>
<i>Major Objectives:</i>		
1. Maintaining free competition	The judiciary	1903 to the early 1970s (particularly 1903-1942)
2. Preventing abuses of economic power; protecting consumers	W.L. Mackenzie King*	1910, 1923
	A number of M.P.'s	c.1890s, 1937, 1946
3. Achieving economic efficiency	Hon. S. Garson, Min. of Justice*	mid-1950s
	Hon. Davie Fulton, Min. of Justice*	c.1960
	Dir. of Invest. & Res.	1961/62 - 1972/73
	Economic Council of Can.	1969
	Bill C-256	1971
	Skeoch-McDonald	1976
	Bills C-42, C-13	1977
	Hon. André Ouellet*	1980-1982
<i>Lesser Objectives:</i>		
1. Declaring the common law	Min. of Justice*	1888 - c.1900
	N. Clarke Wallace and other M.P.'s Some judges	1903-1930s

Table 6-1 (continued):

<i>Objectives</i>	<i>Principal Proponents</i>	<i>Period in which this Objective was Emphasized</i>
2. Fighting inflation	Mackenzie King	1910
	<i>Combines and Fair Prices Act</i>	1919-21
	Min. of Justice* re RPM provision	1951
	Min. of Cons. & Corp. Affairs* re Bill C-256 and Stage I	1971, 1973
	Min. of Cons. & Corp. Affairs re Stage II	1979
3. Protecting small business	N. Clarke Wallace and other M.P.'s	c.1889
	H.H. Stevens re s. 498A and R.B. Bennett re <i>Dominion Trade and Industry Commission Act</i>	1935
	O'Sullivan, J. re resale price maintenance	1951
	Minister,* re Stage I and II	c.1974, 1977
4. Preserving the free enterprise system	Stuart Garson*	early to mid-1950s
	E. Davie Fulton*	late 1950s
	Ron Basford*	1971
	André Ouellet* (re concentration of power)	1980-82
5. Ensuring fairness and honesty in the market-place	Ministers of Cons. and Corp. Affairs*	1971-1982, partic. c.1975 re Stage I
6. Competition policy as a political compromise	Rosenbluth and Thorburn;	
	Goff and Reasons;	1960s and
	Young;	1970s
	Jones	

* Ministers responsible for administering and enforcing the competition-policy legislation

Disjointed Incrementalism?

It could be argued that the development of the objectives of Canadian competition policy over the past ninety-odd years bears a striking resemblance to what David Braybrooke and Charles Lindblom (1970) describe as the process of "disjointed incrementalism". The objectives are not the product of a unitary rational actor seeking to establish a well-defined and completely consistent set of priorities. Rather, they are the product of immediate political and economic pressures (for example, inflation, the Cold War, slow growth, a merger boom), contemporary legal thinking (that is, 'declaring the common law' and the doctrine of free competition), and the evolution of economic thought (that is, the emphasis on economic efficiency). Perhaps this is not surprising, given the tremendous social and economic changes since the first competition legislation was passed in Canada in 1889. While we would not raise disjointed incrementalism to a normative position (as do Braybrooke and Lindblom), it offers a common explanation of how a major public policy evolves over time. Competition policy provides some evidence for the proposition that public policy formulation is an adaptive process of successive approximation. The rational comprehensive or synoptic approach cannot realistically incorporate important elements of the future, for they can seldom be identified when the policy is originally conceived.

On the other hand, it could be argued with some force that disjointed incrementalism has only limited applicability to the case of the objectives of Canadian competition policy. The three major objectives are *not* in conflict and have been articulated, admittedly by different actors, over fairly lengthy periods of times. (See Table 6-1.) In many ways, the policy has been remarkably consistent, while the rhetoric used to justify that policy has changed with the times.

The *core* of Canadian competition policy — the prohibition of combines that lessen competition unduly — was established in the legislation of 1889, and the definition of a combine was extended to include certain mergers or monopolies in 1910. Certainly, new offences were created in response to political pressure and economic conditions: predatory pricing and price discrimination were prohibited in 1935, resale price maintenance was made illegal *per se* in 1951, and new provisions concerning misleading advertising were introduced in the 1960s. (See Table 1-1.) Yet the *heart* of the policy has changed little in terms of its legislative foundations. The concern has always been with the undesirable consequences of restraints of trade. Only a very few restraints have been made illegal *per se* (for example, price maintenance and bid-rigging). Most provisions re-

quire that competition be lessened 'unduly' or 'substantially', or that the restraint constitute a detriment to the public.

The political and philosophical justification for Canadian competition policy has, as we have described, changed noticeably over the past ninety years. When the first legislation was enacted, legislators were clearly seeking to prevent abuses of market power in the hands of business enterprises. The earliest cases saw judges convict the participants in combines in the form of price-fixing agreements, in the name of the public's 'right to free competition'. The doctrine flourished until the 1970s, after which it was largely ignored (rather than rejected) by the judiciary.

In the 1970s and 1980s, efforts to reform the *Combines Investigation Act* were couched largely in terms of economic efficiency. This theme emerged after World War II and found its clearest expression in the Economic Council's report in 1969 and in the Skeoch-McDonald report in 1976. (The latter gave great weight to the dynamic aspects.)

Therefore, since the major stated objectives of competition policy have not been inconsistent, there has been more the *appearance* of disjointed incrementalism than the reality. Rather, it is with the lesser objectives that we see some evidence of disjointed incrementalism. However, this could be overstating the case because the lesser objectives are usually not in conflict with one another and are usually short lived. They have not resulted in significant permanent change in the central substantive provisions or in the enforcement of competition policy.³³

Thus competition policy in Canada is like a great tree that adapts to the political seasons. It creates new branches as well as dropping some old ones. But it holds steadfast to those objectives that are fundamental to its existence.

Notes

1. MacKeigan (1952, p. 604).
2. Wilson (1959, p. 171).
3. We note that the government did so in Bill C-256 in 1971 and in Bills C-42 and C-13 in 1977, but none of these bills were enacted.
4. When we read of the changes in the legislation proposed by a major business lobby group, the Business Council on National Issues (1981a), we are not sanguine about our study's impact on businessmen. Mr. Currie, M.P., in the debates on the first *Combines Investigation Act* in 1910, warned its sponsor, W.L. Mackenzie King, in the following words: "The minister is putting himself up as the chief trust buster of

this country. . . . but men who go about trust busting do not happen to travel very long in public life." (CD, 12 April 1910, p. 6912.) Although King went on to become the longest-serving Prime Minister in Canadian history, Mr. Currie's prediction turned out to be true for subsequent reform-minded Ministers, for example, Ron Basford, Tony Abbott, Warren Allmand, and André Ouellet in the 1970s. Mr. Ouellet was again appointed Minister of Consumer and Corporate Affairs in 1980.

Reforming Canadian competition policy is very hard work as the history of the 1970s attests. Lloyd Reynolds, writing over forty years ago, recognized this and urged would-be reformers to appreciate the range of constraints involved:

It is relatively easy to criticize the past actions of governments and to advocate changes in policy. The practical difficulties of implementing these recommendations, however, must not be overlooked. Before an idea can be made effective in governmental action it must run a long gauntlet. It must be considered politically expedient by the government of the day. The statute must be so drawn as to fall within the authority of the enacting body. Some agency must be charged with enforcement of the statute, and the structure of this agency must be adequate to its intended functions. At any of these points an economically sound proposal may come to grief. (Reynolds, 1940, p. 242.)

Moreover, as the present Director of Investigation and Research has emphasized, there are certain parameters within which competition policy in Canada must operate. The following factors constrain the design of the policy: a small domestic market; an open, but still tariff-protected, economy; high levels of industry concentration; balkanization of the domestic market by provincial regulation; extensive foreign ownership; lack of economies of scale attributable to firms' desire to produce a 'full line', and lack of R&D to compete at home and abroad; the pervasiveness of government intervention; the absence of populist support for policies aimed at the diffusion of economic power; and increasing global economic interdependence. (Hunter, 1982.)

5. We note also that the number of sources of information about the stated objectives of competition policy has increased over time. Initially, the major sources were the Parliamentary debates and the decisions of the judiciary. Today statements, usually quite extensive, may be found in preambles to bills, more frequently in the extensive inquiries made at the behest of government, in ministerial statements (inside and outside Parliament), and in the *Annual Reports* of the Director of Investigation and Research, as well as in his numerous speeches.
6. With the 1923 Act, King emphasized as he did in 1910, that the legislation was designed to protect the interests of consumers and

farmers: "...our desire is to place on the statutes an act which will be of real service to consumers and producers alike in protecting them against the operations of combines which may be detrimental to the public interest." (CD, 9 March 1923, p. 993.)

7. Frank Underhill (1944, pp. 125-26) offers a less charitable view of Mr. King's approach to combines and mergers:

In his book and in many of his speeches Mr. King pats himself on the back for two of his pre-1914 legislative achievements, the Industrial Disputes Investigation Act and the Combines Investigation Act. They have not been useless, but how little have they accomplished in dealing with labor disputes and with concentration of control in modern mass industry! When we look around at the monopolies and near-monopolies in Canada which dominate so much of our economy, the Combines Act resembles nothing so much as the bleating of a pathetic vegetarian lamb in the midst of a carnivorous jungle. That is just it. Mr. King never quite got it into his head... that our civilization is dominated by carnivorous animals. He was meant to be a professor safe in the study, not a statesman out in the jungle. For sooner or later the statesman must clear out the jungle and make it habitable.

8. See, for example, Stanbury (1978a, 1979c); MacCrimmon and Stanbury (1978); and Stanbury and Reschenthaler (1981).
9. *Weidman v. Shragge* (1912) 46 S.C.R. 1 at p. 4.
10. *R. v. Elliott* (1905) 9 C.C.C. 505 at p. 520.
11. (1897) 166 U.S. 290.
12. See, for example, Bork (1965); Sullivan (1977); and Posner (1974).
13. Only in a very few cases, however, was the proportion of the market below this figure. See, for example, *Electrical Contractors Assoc. of Ontario and Dent* (1960) 127 C.C.C. 273; affirmed (1961) 31 C.C.C. 145. Note, however, that in almost all cases the accused jointly accounted for more than three-quarters of the market.
14. See, for example, Von Kalinowski (1982, Ch. 2).
15. There have been a number of subtle conscious parallelism cases in the 1970s and early 1980s. See Stanbury and Reschenthaler (1977) and Webber (1982).
16. The citations are (1977) 34 C.C.C. (2d) 157; and (1981) 54 C.C.C. (2d) 373, respectively. There has been one other conspiracy case to reach the Supreme Court of Canada recently, *Chatwin Motors* (1980) 31 N.R. 345, but it did not develop any new interpretations.
17. More generally, see Reschenthaler and Stanbury (1981); Engelhart (1981); Cairns (1981b); and McFetridge and Wong (1981, 1982). The Business Council on National Issues (1981b) would not agree that s. 32

has been severely weakened. The Minister of Consumer and Corporate Affairs (1981) proposes to remedy these problems by amending s. 32.

18. Economic Council of Canada (1969, p. 19).
19. See Gosse (1962). A similar error was made in the United States. See, for example, the discussion in Thorelli (1955) and Von Kalinowski (1981, Vol. I).
20. See, for example, Posner (1976); American Bar Association (1980); U.S. Department of Justice (1977); and Rowe (1980).
21. In the five-year period from 1978/79 to 1982/83, 691 misleading advertising/deceptive practices cases were completed with a conviction rate of 75 per cent. See Table 3-B in Appendix B.
22. The obvious exception is where a 'market failure' occurs and it is worthwhile for government to intervene. See Economic Council of Canada (1979).
23. This statement, strictly speaking, applies to conspiracy cases. We must emphasize that the price-discrimination and predatory-pricing provisions (now s. 34) and price maintenance and refusal to deal (now s. 38) are outright prohibitions as are the misleading-advertising and deceptive trade-practices provisions. Because of the wording of the section, price-discrimination cases are hard to prove; see Nozick (1976) and Dunlop (1979). New life may have been found in the predatory pricing provision; see *Hoffman LaRoche* (1980) 280 O.R. (2d) 164 (upheld by the Ontario Court of Appeal, (1982) 62 C.C.C. (2d) 118. See the discussion in Gorecki (forthcoming).
24. See the discussion in Stanbury and Reschenthaler (1981).
25. See Linda McQuaig, "Ottawa's Cautious Competition Bill", *Maclean's* (18 July 1983), pp. 36-38 and *Globe and Mail* (24 August 1983), p. B1.
26. The citations are as follows: (1960) 126 C.C.C. 133; (1960) 129 C.C.C. 7; and (1977) 32 C.C.C. (2d) 1.
27. Between 1910 and 1960, legislation against conspiracies or agreements in restraint of trade (e.g., price-fixing or market-sharing arrangements) could be found in both the *Criminal Code* and the *Combines Investigation Act*. The test under the former was whether competition was lessened unduly, while under the latter it was whether or not the 'combine' operated to the detriment or against the interest of the public. Most conspiracy cases during this period were brought under the *Criminal Code* provisions; see Gorecki and Stanbury (1981c). On a number of occasions, however, the courts in the context of a conspiracy case brought under the Act have held that the 'unduly' test and the 'public detriment' test amounted to the same thing. See *R. v. Clarke* (1907) 1 Alta L.R. 358 at p. 368; *Weidman v. Shragge* (1912) 46 S.C.R. 1 at p. 25; *R. v. Alexander* (1932) 2 D.L.R. 109; *R. v. Canadian Import* (1935) 62 C.C.C. 342; *R. v. Canadian Breweries* (1960) O.R. 601. As we

have noted in Chapter 3, in the *Eddy Match* case (1952) 104 C.C.C. 39. (1954) 109 C.C.C. 1, dealing with monopoly, the doctrine of free competition was applied in a somewhat modified form. In *Canadian Breweries*, the first important merger case, Mr. Justice McRuer accepted the doctrine as a general principle of public policy. In practice, however, the adverse rulings in *Canadian Breweries*, *B.C. Sugar*, and *K.C. Irving* suggest to us that the strict letter of the law, that is, that public detriment must be established beyond a reasonable doubt, effectively outweighed any broad commitment to 'free competition'.

28. See Cairns (1981a, 1981c); Roberts (1977); and Reschenthaler and Stanbury (1977).
29. The present Director of Investigation and Research has argued as follows:

The primary objective of Canadian antitrust policy is economic efficiency, attained by the promotion of a competitive environment which enables impersonal markets to determine the optimum resource allocation. The means of achieving this objective is the design and enforcement of laws which prevent artificial restraints on normal market forces. The problem, with which we have been wrestling for a dozen years, is to reconcile this readily agreed-upon objective to disputed economic values and the methods for their application. There has been a long series of studies, recommendations, and proposed legislation on mergers and monopolization, none of which proved satisfactory to all sides. (Hunter, 1981, p. 2.)

Studies of the enforcement of competition policy include Ball (1934); Reynolds (1940); Rosenbluth and Thorburn (1963); Gorecki and Stanbury (1979a, 1981c); and Gorecki (1981a).

30. See Rosenbluth and Thorburn (1963) and Gorecki (1981a).
31. See Nozick (1976); Dunlop (1979); and Gorecki (forthcoming).
32. See Stanbury (in process); Brecher (1982); Stegemann (1977); Stanbury (1977a, 1978b); MacCrimmon and Stanbury (1978); Stanbury and Reschenthaler (1981); and Canada (1981b).
33. There is one important exception to this statement. As Table 3-B in Appendix B makes clear, the amendments to the *Combines Investigation Act* concerning misleading advertising in 1960, 1969 and 1976 have produced a major shift in the Bureau of Competition Policy's enforcement activities. In contrast, Table 4-B indicates that the predatory pricing/price-discrimination amendments in 1935 resulted in only a few prosecutions, most of which were unsuccessful. At the same time, we must point out that the ban on resale-price maintenance, introduced in 1951, began to produce a sizeable number of cases in the 1970s. (See Tables 4-B and 6-B in Appendix B.)



Postscript: Bill C-29, 2 April 1984

On 2 April 1984, the Minister of Consumer and Corporate Affairs, the Honourable Judy Erola, tabled Bill C-29, the third version of the Stage II amendments to the *Combines Investigation Act*. In terms of the substantive provisions, the highlights of the Bill were as follows:¹

- (1) Mergers will become subject to civil law provisions adjudicated by the courts. Proposed mergers may be prohibited, and completed mergers may be dissolved where they are found to "prevent or lessen competition *significantly*". (Emphasis added.) However, where the merger "has brought about or is likely to bring about gains in efficiency that will result in a substantial real net savings of resources for the Canadian economy", the court shall not make an order against it. When mergers are being negotiated in which the parties jointly have assets or sales in Canada exceeding \$500 million, the parties are required to notify the Director of Investigation and Research before the transaction is completed and to provide him with certain information as specified in the Act.
- (2) The criminal offence of monopoly is to be repealed, and a civil provision concerning "abuse of dominant position", to be adjudicated by the courts, is to be introduced. Before a prohibition order can be made, the Director of Investigation and Research must establish, on the balance of probabilities, that:
 - The firm or firms involved "substantially or completely control" the relevant market.
 - The firm or firms involved have engaged in or are engaging in "a *practice* of anti-competitive acts" (emphasis added) such as those listed in the section.

- The practice "has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market." (Emphasis added.)

The list of anti-competitive acts includes freight equalization on the plant of a competitor, the temporary and selective use of 'fighting brands', buying up products to prevent the erosion of price levels, and the pre-emption of scarce facilities or resources required by a competitor. In most cases, these acts require some element of intent to prevent entry or to limit the capability or expansion of a competitor. The section provides that no order shall be made where competition has been lessened substantially "as a result of the superior economic efficiency of the person or persons against whom the order is sought."

- (3) The conspiracy section is to be amended to:
 - Reduce the ambiguity in recent Supreme Court of Canada decisions concerning the inference of a conspiracy from circumstantial evidence and proof of intent
 - Raise the maximum fine from \$1 million to \$2 million
 - Broaden the export exemption.
- (4) A new civil provision concerning 'delivered pricing', to be adjudicated by the courts, is to be introduced.
- (5) The commercial activities of federal and provincial Crown corporations, where they are in actual or potential competition with privately owned firms, are to be subject to the *Combines Investigation Act*.
- (6) Section 309 of the *Bank Act* is to be enacted, with minor modifications, as section 33 of the *Combines Investigation Act*. It makes illegal *per se* a number of types of agreements among banks, such as those relating to interest rates on loans or deposits.
- (7) Specialization agreements, registered by the Restrictive Trade Practices Commission, are to be exempt from the conspiracy and exclusive dealing sections of the Act. The key test for registration is whether the proposed agreement "is likely to result in a substantial real net savings of resources for the Canadian economy [that] could not reasonably be expected to be attained if the agreement were not implemented."

The *Background Information and Explanatory Notes* accompanying Bill C-29 state that the *Combines Investigation Act* is being amended "to strengthen it and thereby increase its effectiveness in light of a

number of developments." These developments include the need to delineate certain exemptions more clearly, to clarify the law in light of recent judicial decisions, to remedy long-standing weaknesses in the basic structure of the legislation, to broaden the Act's coverage, and to refine the administration and adjudication of the Act.

What objectives is Bill C-29 intended to achieve? The *Explanatory Notes* (p. 2) speak of three "principles" which the government has sought to incorporate in the bill:

First, the need for price (and cost) restraint to help ensure that double-digit inflation does not reoccur and that the recovery from the recent severe recession produces a period of sustained economic growth. Second, the government has sought to ensure that these amendments foster dynamic growth and efficiency through reliance on market forces. In particular, it is essential that Canada's international competitiveness be strengthened to meet the competition of our trading rivals. Third, the Bill is concerned with fairness in the functioning of markets — fairness between producers and consumers, fairness between businesses and their suppliers, and suppliers and their customer, as well as fairness between large and small producers.

The *Explanatory Notes* (p. 3) under the heading "The Role of Competition Policy" emphasize the importance of *efficiency*, both static and dynamic, as the primary objective of Canadian competition policy:

Canadians want an economy that allocates our scarce resources in the most *efficient* way possible at any moment of time. The value of competition as a social process is that it is the greatest spur to efficiency. It has been suggested that the best of all monopoly profits is "a quiet life". But, consumers who pay the price for the monopolist's quiet life will strongly disagree. Failure to adopt the lowest cost methods of production inevitably results in economic waste and in higher prices for consumers. An efficient economy is also one that is highly responsive to the preferences of consumers. . . .

Canadians also want a *dynamically* efficient economy — one that can meet the challenges of economic and social change. Indeed, the only economic certainty is that of change itself. . . . A dynamic economy not only responds to the forces of change, it actively seeks to generate change capable of enhancing our material well-being in the broad sense. Imagine the economy of

1984 without transistors and the silicon chip; without the jet engine; inexpensive photocopying; the electronic computer; plastics of all kinds; synthetic fibres; and without television. . . . It is competition that provides the best assurance that dynamic forces are able to operate to best effect. (Emphasis in original.)

The primacy of efficiency can also be ascertained from the substantive provisions of Bill C-29 itself. First, even those mergers which are found by the courts to lessen competition significantly *shall not* be prohibited if the merger has brought about or is likely to bring about "gains in efficiency that will result in a substantial real net savings of resources for the Canadian economy." Secondly, the central criterion to be employed in judging proposed specialization agreements uses the same words. In our view, these words refer to *social* efficiency gains, not merely pecuniary advantages, to the firms involved. The use of the word 'net' suggests that the courts (or RTPC) are to be aware of the fact that mergers and specialization agreements can increase the firms' market power as well as their potential to reap real efficiency gains. Market power may be used to indulge in 'X-inefficiency' rather than earn excess profits. Hence the courts must decide if there is a net gain: that is, whether realized economies of scale or scope exceed any increase in X-inefficiency.

There are other points where the importance of efficiency is stressed. In section 31.41, which deals with the abuse of dominant position, even where competition has been lessened *substantively*, the court *shall not* make an order if it finds that the change is the result of "superior economic efficiency". We take this to mean that a firm which grows to a position of dominance (or retains such a position) by reason of lower costs or a greater capacity to innovate (demonstrated, for example, by the development of new products) will not be subject to legal restraint even if the result is a substantial lessening of competition.

We note that section 31.42, the new delivered pricing section, speaks of a customer being "denied an advantage that would otherwise be available to him". We take this to mean that if the customer can lower his transportation costs by taking delivery of an article at another delivery point (available to other customers of the supplier), the section may be used to obtain a court order to achieve these gains in efficiency.

We must note, however, that the *Explanatory Notes* (pp. 3, 4) accompanying Bill C-29 also argue that:

Canadians also want a *fair* economy. Obviously, this is a value-laden term, but by a fair economy we mean one where the economic success of business firms is based on their responsiveness to consumers' needs, wants and hopes. We want an economy where firms prosper by offering better quality, lower prices (reflecting lower costs in most cases) and new goods and services that consumers find attractive. A fair economy is one where restrictive trade practices are minimized . . . (Emphasis in original.)

An abundance of opportunity is also a hallmark of a fair economy. Subject to basic technologies and economic constraints, entry into both product and labour markets must be as free as possible. Sellers must be free to try to sell new products or services in new ways to new customers. They must be free to experiment with new pricing policies subject only to the forces of competition and the requirement not to engage in predatory behaviour . . .

A fair economy requires government to establish and enforce the 'rules of the game'. Unfortunately, the competitive process is not always self-sustaining. Through a wide variety of stratagems and trade practices, business firms seek to strengthen their advantages and obtain at least some degree of market power. However, some limits must be placed on this natural tendency by an effective competition policy if the market system is to work for the benefit of all rather than for a self-chosen few.

In our view, this concept of fairness will seldom result in conflict with the primary objective of efficiency.

It seems clear, therefore, that the emphasis on efficiency (broadly defined) as an objective of competition policy, which first began to be well mentioned in the late 1950s, will clearly become the primary objective of competition policy if the amendments to the *Combines Investigation Act* embodied in Bill C-29 are enacted.

The bill died on the Order Paper on 9 July 1984, when the House rose for the general election called for 4 September of that year.

Note

1. For more details, see W.T. Stanbury, "Half a Loaf: Bill C-29 Amendments to the *Combines Investigation Act*". *Canadian Business Law Journal* (forthcoming).



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Appendix A: Text of Major Criminal Offences under the Combines Investigation Act¹

Conspiracy

32. (1) Every one who conspires, combines, agrees or arranges with another person

(a) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any product,

(b) to prevent, limit or lessen, unduly, the manufacture or production of a product, or to enhance unreasonably the price thereof,

(c) to prevent, or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance upon persons or property, or

(d) to otherwise restrain or injure competition unduly, is guilty of an indictable offence and is liable to imprisonment for five years or a fine of one million dollars or to both.

(1.1) For greater certainty, in establishing that a conspiracy, combination, agreement or arrangement is in violation of subsection (1), it shall not be necessary to prove that the conspiracy, combination, agreement or arrangement, if carried into effect, would or would be likely to eliminate, completely or virtually, competition in the market to which it relates or that it was the

object of any or all of the parties thereto to eliminate, completely or virtually, competition in that market.

(Subsections 2 to 7 omitted.)

Merger and Monopoly

33. Every person who is a party or privy to or knowingly assists in, or in the formation of, a merger or monopoly is guilty of an indictable offence and is liable to imprisonment for two years, 1960, c.45, s. 13.

S. 2 of the *Combines Investigation Act* states:

"merger" means the acquisition by one or more persons, whether by purchase or lease of shares or assets or otherwise, of any control over or interest in the whole or part of the business of a competitor, supplier, customer or any other person, whereby competition

- (a) in a trade, industry or profession,
- (b) among the sources of supply of a trade, industry or profession,
- (c) among the outlets for sales of a trade, industry or profession, or
- (d) otherwise than in paragraphs (a), (b) and (c),

is or is likely to be lessened to the detriment or against the interest of the public, whether consumers, producers or others; "monopoly" means a situation where one or more persons either substantially or completely control throughout Canada or any area thereof the class or species of business in which they are engaged and have operated such business or are likely to operate it to the detriment or against the interest of the public, whether consumers, producers or others, but a situation shall not be deemed a monopoly within the meaning of this definition by reason only of the exercise of any right or enjoyment of any interest derived under the *Patent Act*, or any other Act of the Parliament of Canada;

Price Discrimination and Predatory Pricing

- 34.** (1) Every one engaged in a business who
- (a) is a party or privy to, or assists in, any sale that discriminates to his knowledge, directly or indirectly, against competitors of a purchaser of articles from him in that any discount, rebate, allowance, price concession or other advantage is granted to the purchaser over and above any discount, rebate, allowance, price concession or other advantage that, at the time the articles are sold to such purchaser, is available to such competitors in respect of a sale of articles of like quality and quantity;
 - (b) engages in a policy of selling products in any area of Canada at prices lower than those exacted by him elsewhere in Canada, having the effect or tendency of substantially lessening competition or eliminating a competitor in such part of Canada, or designed to have such effect; or
 - (c) engages in a policy of selling products at prices unreasonably low, having the effect or tendency of substantially lessening competition or eliminating a competitor, or designed to have such effect, is guilty of an indictable offence and is liable to imprisonment for two years.

(Subsections 2 and 3 omitted.)

Discriminatory Advertising Allowances

- 35.** (1) In this section, "allowance" means any discount, rebate, price concession or other advantage that is or purports to be offered or granted for advertising or display purposes and is collateral to a sale or sales of products but is not applied directly to the selling price.
- (2) Every one engaged in a business who is a party or privy to the granting of an allowance to any purchaser that is not offered on proportionate terms to other purchasers in competition with the first-mentioned purchaser, (which other purchasers are in this section called "competing purchasers"), is guilty of an indictable offence and is liable to imprisonment for two years.

(Subsection 3 omitted.)

Misleading Advertising

36. (1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever,

(a) make a representation to the public that is false or misleading in a material respect;

(b) make a representation to the public in the form of a statement, warranty or guarantee of the performance, efficacy or length of life of a product that is not based on an adequate and proper test thereof, the proof of which lies upon the person making the representation;

(c) make a representation to the public in a form that purports to be

(i) a warranty or guarantee of a product, or

(ii) a promise to replace, maintain or repair an article or any part thereof or to repeat or continue a service until it has achieved a specified result

if such form of purported warranty or guarantee or promise is materially misleading or if there is no reasonable prospect that it will be carried out; or

(d) make a materially misleading representation to the public concerning the price at which a product or like products have been, are or will be ordinarily sold; and for the purposes of this paragraph a representation as to price is deemed to refer to the price at which the product has been sold by sellers generally in the relevant market unless it is clearly specified to be the price at which the product has been sold by the person by whom or on whose behalf the representation is made.

(Note that there are several other sections dealing with deceptive practices: 36.1 (tests and testimonials); 36.2 (double ticketing); 36.3 (pyramid selling); 36.4 (referral selling); 37 (bait and switch); 37.1 (sale above advertised price); 37.2 (promotional contests). A substantial majority of cases are brought under section 36.)

Price Maintenance and Refusal to Supply

38. (1) No person who is engaged in the business of producing or supplying a product, or who extends credit by way of credit cards or is otherwise engaged in a business that relates to credit

cards, or who has the exclusive rights and privileges conferred by a patent, trade mark, copyright or registered industrial design shall, directly or indirectly,

(a) by agreement, threat, promise or any like means, attempt to influence upward, or to discourage the reduction of, the price at which any other person engaged in business in Canada supplies or offers to supply or advertises a product within Canada; or

(b) refuse to supply a product to or otherwise discriminate against any other person engaged in business in Canada because of the low pricing policy of that other person . . .

(Subsection 2 omitted.)

(3) For the purposes of this section, a suggestion by a producer or supplier of a product of a resale price or minimum resale price in respect thereof, however arrived at, is, in the absence of proof that the person making the suggestion, in so doing, also made it clear to the person to whom the suggestion was made that he was under no obligation to accept the suggestion and would in no way suffer in his business relations with the person making the suggestion or with any other person if he failed to accept the suggestion, proof of an attempt to influence the person to whom the suggestion is made in accordance with the suggestion.

(4) For the purposes of this section, the publication by a supplier of a product, other than a retailer, of an advertisement that mentions a resale price for the product is an attempt to influence upward the selling price of any person into whose hands the product comes for resale unless the price is so expressed as to make it clear to any person to whose attention the advertisement comes that the product may be sold at a lower price.

(5) Subsections (3) and (4) do not apply to a price that is affixed or applied to a product or its package or container.

(6) No person shall, by threat, promise or any like means, attempt to induce a supplier, whether within or without Canada, as a condition of his doing business with the supplier, to refuse to supply a product to a particular person or class of persons because of the low pricing policy of that person or class of persons . . .

(Subsections 7 and 7.1 omitted.)

(8) Every person who violates subsection (1) or (6) is guilty of an indictable offence and is liable on conviction to a fine in the discretion of the court or to imprisonment for five years or to both.

(9) Where, in a prosecution under paragraph (1)(b), it is proved that the person charged refused or counselled the refusal to supply a product to any other person, no inference unfavourable to the person charged shall be drawn from such evidence if he satisfies the court that he and any one upon whose report he depended had reasonable cause to believe and did believe

(a) that the other person was making a practice of using products supplied by the person charged as loss-leaders, that is to say, not for the purpose of making a profit thereon but for purposes of advertising;

(b) that the other person was making a practice of using products supplied by the person charged not for the purpose of selling such products at a profit but for the purpose of attracting customers to his store in the hope of selling them other products;

(c) that the other person was making a practice of engaging in misleading advertising in respect of products supplied by the person charged; or

(d) that the other person made a practice of not providing the level of servicing that purchasers of such products might reasonably expect from such other person.

Note

1. R.S.C., c. C-23 (as amended, effective 1 January 1976).

*Appendix B: Tables on the
Administration and
Enforcement of
Competition Policy in
Canada*

Table 1A-B: Operational Activities of the Bureau of Competition Policy Excluding the Misleading Advertising and Deceptive Marketing Practices Provisions, 1965/66 to 1973/74

	1965- 66	1966- 67	1967- 68	1968- 69	1969- 70	1970- 71	1971- 72	1972- 73	1973- 74
1. Number of files opened on receipt of complaints or inquiries in the nature of complaints	117	117	97	107	141	255	271	188	165
2. Formal applications for inquiries	2	0	0	1	1	2	5	2	6
3. Formal inquiries in progress at the end of the year	47	54	59	57	76	83	86	76	77
4. Preliminary inquiries of an extensive nature	23	19	19	15	28	17	30	28	30
5. Inquiries disposed of by reports of discontinuance to the Minister	10	22	15	19	4	9	17	19	8
6. Inquiries referred direct to the Attorney General of Canada under section 15	2*	2*	2*	4	12	9	16	9	14

	1965- 66	1966- 67	1967- 68	1968- 69	1969- 70	1970- 71	1971- 72	1972- 73	1973- 74
7. Inquiries closed on the recommendation of the Attorney General of Canada	0	0	0	0	0	0	1	5	7
8. Prosecutions or other proceedings commenced	3	7	5	3	7	8	6	14	8
9. Applications under Part IV.1					— not applicable —				
10. Formal interventions under section 27.1					— not applicable —				
11. Other representations to bodies dealing with regulatory change					— not applicable —				
12. Research projects completed	0	0	2	0	0	2	0	0	0
13. Research projects in progress	1	3	2	2	4	2	3	3	3
14. RTPC reports to Minister	6	3	2	3	1	5	0	1	0

* And in which charges were laid.

Sources: Annual Reports of the Director of Investigation and Research, Combines Investigation Act, and data provided by the Bureau of Competition Policy.

Table 1B-B: *Operational Activities of the Bureau of Competition Policy Excluding the Misleading Advertising and Deceptive Marketing Practices Provisions, 1974/75 to 1982/83*

	1974- 75	1975- 76	1976- 77	1977- 78	1978- 79	1979- 80	1980- 81	1981- 82	1982- 83
1. Number of files opened on receipt of complaints or inquiries in the nature of complaints	84*	158*	143*	173*	203*	262*	238*	249*	256*
2. Formal applications for inquiries	5	4	7	5	7	7	8	9	8
3. Formal inquiries in progress at the end of the year	81	71	73	76	73	78	69	69	71
4. Preliminary inquiries of an extensive nature	29	14					— classification no longer made —		
5. Inquiries disposed of by reports of discontinuance to the Minister	13	14	8	14	16	21	26	20	19
6. Inquiries referred direct to the Attorney General of Canada under section 15	11	18	26	23	14	24	21	34	24

	1974- 75	1975- 76	1976- 77	1977- 78	1978- 79	1979- 80	1980- 81	1981- 82	1982- 83
7. Inquiries closed on the recommendation of the Attorney General of Canada	2	2	4	6	6	3	5	6	5
8. Prosecutions or other proceedings commenced	7	12	16	24	11	21	6	24	21
9. Applications under Part IV.1	not applicable	not applicable	20	1	1	2	0	0	1
10. Formal interventions under section 27.1	not applicable	not applicable	3	4	0	3	4	6	4
11. Other representations to bodies dealing with regulatory change	not applicable	not applicable	1	1	2	1	0	9	7
12. Research projects completed	1	0	2	3	8	11	8	6	2
13. Research projects in progress	3	3	8	8	12	5	7	8	8
14. RTPC reports to Minister	0	0	1	0	1	0	0	1	2

* Substantive complaints only; change in methods of recording complaints from 1974/75 onwards.

Sources: Annual Reports of the Director of Investigation and Research, Combines Investigation Act, and data provided by the Bureau of Competition Policy.

Table 2-B: Combines Cases and Activities, 1889/90 to 1982/83

Period, fiscal year ending March 31	Combines Prosecutions ¹				RPM and Ref. to Sell	Other	Reports or Cases Sent to Attorney General but not Prosecuted	Discontinued Inquiries	Files Opened in Response to Complaints ²
	Total	Avg. Per Year	Con- spiracy	Merger and/or Monopoly					
1880-1910	8	.4	8	—	not applicable	—	n.a.	n.a.	n.a.
1911-1923	1	.08	1	—	—	—	n.a.	n.a.	n.a.
1924-1940	14	.9	11	1	—	2 ²	17 ⁷	n.a.	538
1941-1946	—	—	—	—	—	—	0 ⁷	n.a.	66
1947-1955	12	1.5	9	1	2	—	9 ⁷	n.a.	794 ⁴
1956-1960	18	3.6	13	2	1	2 ⁸	6 ⁷	25 ¹⁰	456
1961-1965	18	3.6	7	—	10	1 ³	10	77	816
1966-1970	25	5.0	16	1	7	1 ³	5	82	579
1971-1975	45	9.0	18	4	15	8 ⁶	19	95	963 ⁵
1976-1980	71	14.2	18	2	47	4	19	74	941 ⁶
1981-1983	44	14.7	11	0	26	7	11 ¹⁰	63	743 ⁶

Notes

1. Excludes 3 patent cases started in 1945/46, 1967/68 and 1969/70 and all misleading advertising and deceptive practices cases. The first dealt with optical goods, the last two, Union Carbide's plastic extrusion and printing patents.
2. *Canadian Import, merger and conspiracy; Symington et al.* Eventually convicted of fraud under the Secret Commissions Act.
3. Predatory pricing.
4. 1950/51 - 1954/55 only (542).
5. Excludes those opened by the Registrar: 23, 1924-1940; 34, 1947-1950; 30, 1950-1952.
6. 1975-1983 figures cover "substantive complaints only, due to change in procedure in Records Office."
7. Total reports by the Registrar, Special commissioner or RTPC dated by day transmitted to the Minister: 26, 1, 22, 20 respectively.
8. 2 price discrimination or predatory pricing cases, 2 conspiracy and monopoly cases, 3 RPM and conspiracy cases, 1 monopoly and predatory pricing case.
9. 1951-1955 only.
10. 1980/81 and 1981/82 only.

n.a. = data not available

Sources: Gorecki and Stanbury (1979a) and Annual Reports of the Director of Investigation and Research.

Table 3-B: Activities Under the Misleading Advertising and Deceptive Practices Sections, 1960/61 to 1982/83

Fiscal Year	Completed Cases					Con- viction Rate	Files Opened	Completed Investi- gations	Cases Referred to Attorney General	Cases Referred to Attorney Closed on his Recommendation	Formal Application for an Inquiry	
	New Sections 1 Jan. 1976											
	S. 37 (33D)*	S. 36 (33C)*	Non- Convic- tions	Convic- tions	Non- Convic- tions							
1982/83	82	{ — not applicable — }			48	121	95	27	122	199	6	1
81	81	{ — not applicable — }			31	103	103	31	134	142	13	0
1979/80	80	{ — not applicable — }			32	100	100	32	132	167	2	0
79	79	9	2	1	0	109	109	26	147	129	12	0
78	78	17	11	2	0	70	70	19	119	174	11	0
1976/77	56	26	3	3	3	28	28	4	120	141	n.a.	3
76	56	14	16	2	2	0	0	0	88	117	14	4
1974/75	68	17	19	3	not applicable	not applicable	not applicable	not applicable	107	120	12	1
74	52	7	18	6	6	83	83	84	107	126	12	12
73	45	10	23	4	4	82	82	83	911	123	10	8
72	40	20	21	7	7	88	88	69	3470	649	5	9
71	15	6	28	7	7	56	56	75	2872	84	12	1
1969/70	2	0	25	2	2	29	29	93	2520	105	data not available	data not available
69	not applicable	13	2	2	2	15	15	87	412	33	data not available	data not available
68	68	8	0	0	0	8	8	100	42	33	data not available	data not available
67	67	4	0	0	0	4	4	100	15	15	data not available	data not available
66	66	6	0	0	0	6	6	100	15	15	data not available	data not available
1964/65	65	1	1	1	1	2	2	50	15	15	data not available	data not available
64	64	1	3	3	3	4	4	25	15	15	data not available	data not available
63	63	5	1	1	1	6	6	83	15	15	data not available	data not available
62	62	1	1	1	1	1	1	100	15	15	data not available	data not available
1960/61	61	0	0	0	0	0	0	—	15	15	data not available	data not available

* S. 36 and s. 37 were amended effective 1 January 1976 and became s. 36(1) (d) and s. 36(1) (a) respectively. Prosecutions completed in 1977/78 and 1978/79 were begun earlier under s. 36 and s. 37.

Sources: Annual Reports of Director of Investigation and Research, Combines Investigation Act, various years; *Proposals for a New Competition Policy for Canada, First Stage* (Ottawa: Information Canada, 1973), pp. IC-34C; and T. Muir-Warden, Dept. of Consumer and Corporate Affairs. (Note that depending on which Annual Report is used, one can find slight variations in the data because of errors and subsequent corrections.)

Table 4-B: *Proportion of Consumer Cases, by Offence, Won¹ by the Crown 1890 to 1983**

Offence	1890-1910	1911-1923	1924-1940	1941-1946	1947-1955	1956-1960	1961-1965	1966-1970	1971-1975	1976-1980	1981-1983
Conspiracy	5/8	0.1	11.12	—	8.9	13.13	7.7	15.16	11.17	10.18	4.11
RPM/Refusal to Sell	—	—	—	—	2/2	1.1	9.10	7.7	13.15	36.47	15.26
Merger and/or Monopoly	—	—	0.1	—	1/1	0.2	—	1.1	3.4	0.2	0.0
Price Discrimination/ Predatory Pricing	—	—	—	—	—	0.2	0.1	0.1	1.2	0.2	2.4 ²
Other (multiple offences)	—	—	1/1	—	—	—	—	—	4.6	1.2	1/3
Total Cases	8	1	14	0	12	18	18	25	44	71	44
Total conviction rate ²	5/8 63%	0.1 0	12.14 86%	—	11.12 92%	14.18 78%	16.18 89%	23.25 92%	32.44 73%	47.71 68%	22.44 50%

* Fiscal year ending March 31, 1890 etc. (Excludes misleading-advertising and deceptive-practices cases.)

Notes

1. Includes granting of a Prohibition Order under s. 30(2).

2. Includes 1 case re discriminatory advertising allowances won by the Crown.

Sources: Gorecki and Stanbury (1979a).

Table 5-B: The Disposition of Conspiracy (S. 32) Cases, 1970/71 to 1982/83

Disposition	1970/71- 1974/75	1975/76- 1979/80	1980/81- 1982/83
• Total cases referred to Attorney General	19	28 ^a	18 ^b
• Cases not prosecuted	4	8	6
<i>Results of Prosecutions</i>			
• Non-convictions	2	8	7
- Charges dropped	0	1	1
- Dismissed at preliminary hearing	2	1	1
- Acquitted at trial	0	7	5
• Convictions	13	11	3
- Fine only	1	1	0
- Prohibition Order only	7	4	3
- Fine and Prohibition Order	5	6	2
• Conviction rate	87%	38%	42%

Notes

- a. Includes 2 cases where accused was charged under both s. 32 and s. 33 (monopolies) i.e. Large Lamp; Allied Chemical and Cominco.
 b. Includes 1 case (Quebec Concrete) in which a s. 33 charge was also laid, but dropped when accused pleaded guilty to conspiracy charges.

Sources: Compiled by the authors from the Annual Reports of the Director of Investigation and Research.

Table 6-B: *Results of Resale Price Maintenance Cases in Which Charges Were Laid, 1970/71 to 1982/83*

<i>Year^a ended 31 March</i>	<i>Total Cases</i>	<i>Non- Convic- tion^b</i>	<i>P.O. Only</i>	<i>Fine Only</i>	<i>Fine + P.O.</i>	<i>Conviction Rate^c</i>	<i>Guilty Pleas^d</i>
1971	1	0	0	0	1		1
72	2	1	0	0	1		1
73	3	1	0	2	0		1
74	2	0	1	0	1		2
75	7	0	0	3	4		6
1971-75	15	2	1	5	7	87%	85% ^e
1976	7	0	0	4	3		7
77	6	1	0	3	2		5
78	5	1	2	1	1		4
79	17	6	1	6	4		7
80	12	3	3	4	2		6
1976-80	47	11	6	18	12	77%	81% ^e
1981	8	3	0	5	0		5
82	7	3	0	4	0		3
83	11	5	0	5	1		5
1981-83	26	11	0	14	1	58%	87% ^e

Notes

- a. Year in which the final proceedings in the case were completed.
- b. Stay of proceedings, acquitted, or discharged at preliminary hearing.
- c. Prohibition Order only counted as a conviction.
- d. Prohibition Order only counted as a guilty plea.
- e. Percentage of convictions (including P.O. only) in which the accused pleaded guilty.

P.O. = Prohibition Order

Source: Compiled by the authors from the Annual Reports of the Director of Investigation and Research.

Table 7-B: Penalties and Remedies in Antitrust Cases in Canada and the United States

<i>Penalties/Remedies</i>	<i>Canada</i>	<i>United States</i>
• Fines	Yes, generally higher limits than U.S. (See Table 8-B.)	Yes (See Table 8-B.)
• Divestiture, dissolution	Yes, available since 1952; never used	Available since 1890; used but only "pyrrhic victories", say critics
• Imprisonment	Yes, used only 2 or 3 times in misleading advertising cases	Yes, used more frequently, since 1974 amendments
• Injunction (P.O./consent order)	Yes, only for the few civil matters since 1976; P.O. only used as a type of 'consent order' since 1952	Yes, often after a <i>nolo contendere</i> plea
• Tariff reduction	Yes, available since 1897 but used only once in 1902	No
• Private treble damages	No, single damages only since 1976	Yes, account for 95 + % of anti-trust cases
• Class actions	No (proposed in 1977)	Yes
• Substitute actions	No (proposed in 1977)	Yes, <i>parvus patriae</i> for state A-Gs since 1976
• Declaring void patents or trademarks	Yes, available since 1910; used in 3 or 4 cases, but long delays	No
• Criminal contempt	Yes, for violation of civil orders since 1976 (since 1952 for P.O.)	Yes, for violation of civil orders since 1890
• Publicity	Informal use only	Informal use only

P.O. = Prohibition Order

Source: Stanbury (1983).

Table 8-B: *Maximum Fine Per Count Permitted in Conspiracy Cases in Canada and the United States*

(a) United States: <i>Sherman Act</i>		
<i>Period</i>	<i>Company</i>	<i>Individual</i>
1890 – 1955	\$ 5 000	\$ 5 000
1955 – 1974	\$ 50 000	\$ 50 000
1974 to date	\$1 000 000*	\$ 100 000*
(b) Canada: <i>S. 32 Combines Investigation Act or predecessor</i>		
<i>Period</i>	<i>Company</i>	<i>Individual</i>
1889 – 1910	\$ 10 000***	\$ 4 000**
1910 – 1919	(a) \$ 10 000**	(a) \$ 4 000**
	(b) \$ 1 000/day	(b) \$ 1 000/day
1923 – 1952	(a) \$ 10 000**	(a) \$ 4 000**
	(b) \$ 25 000	(b) \$ 10 000
1953 – 1975	Court's discretion	Court's discretion
1976 to date	\$1 000 000	\$1 000 000

(a) Criminal Code

(b) Combines Investigation Act

* The offence was made a felony in 1974; previously it had been a misdemeanor.

** \$200 minimum

*** \$1 000 minimum

Source: Stanbury (1983).

Table 9-B: *Average Fine per Corporation* in Conspiracy and Price Maintenance Cases, 1889-1983*

<i>Period</i>	<i>Conspiracy</i>	<i>Price Maintenance</i>		
1889 - 1910	\$ 5 000 1C; 2F			
1911 - 1925	No successful prosecutions		Not an offence until 1951	
1926 - 1942	\$ 2 774 7C; 42F			
1950 - 1959	\$ 7 046 17C; 147F		\$ 502 3C; 3F	
1960 - 1969	\$ 7 576 21C; 152F		\$ 1 550 11C; 11F	
1970	\$ 10 000		\$ 1 000	
1971	20 417	\$ 24 469 5C; 34F	—	\$ 4 750 11C
1972	—		2 250	
1973	250		1 500	
1974	28 835		7 167	
1975	\$ 4 571		\$ 5 200 ¹	
1976	21 676	\$ 41 370 7C; 37F	11 917	\$ 17 362 29C
1977	183 333		17 000	
1978	55 000		11 500 ²	
1979	—		41 750	
1980	\$ 25 000	1C; 2 Assoc.	\$ 18 750	4C
1981	—		\$ 36 500	4C
1982	\$ 21 714 ³	2C; 6F & 11	\$ 20 286 ⁴	6C
1983 (to Mar. 31)	101 000	2C; 10F	\$ 20 250	2C
1980-83	63 789 ³	19F	\$ 25 219	16C

Notes

C = cases; F = firms; I = individuals

* includes trade associations

1. Includes 1 individual fined \$1 000.

2. Includes 2 individuals fined \$3 000 and \$1 000 respectively.

3. Includes 1 individual fined \$2 000.

4. Includes 1 individual fined \$10 000.

Sources: Stanbury (1976) and updated by the authors from the Annual Reports of the Director of Investigation and Research.



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